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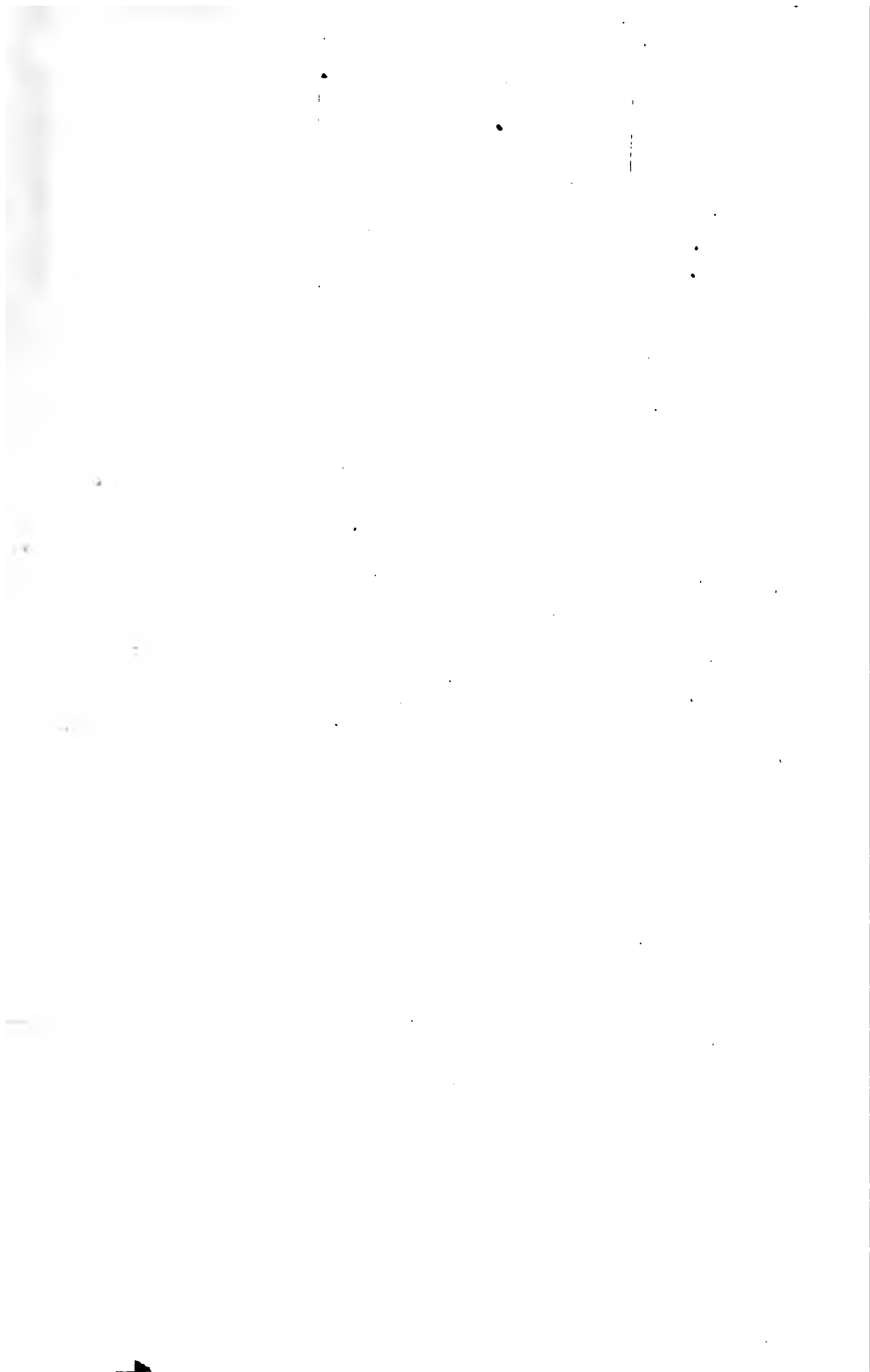




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THE LAW OF REAL PROPERTY

BEING

A COMPLETE COMPENDIUM OF REAL ESTATE LAW, EMBRACING ALL CURRENT CASE LAW, CAREFULLY SELECTED, THOROUGHLY ANNOTATED AND ACCURATELY EPITOMIZED; COMPARATIVE STATUTORY CONSTRUCTION OF THE LAWS OF THE SEVERAL STATES; AND EXHAUSTIVE TREATISES UPON THE MOST IMPORTANT BRANCHES OF THE LAW OF REAL PROPERTY.

EDITED BY

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"Ballards' Ohio Law of Real Property."

VOL. 10.

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Book

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PREFACE.

Beginning where the work on the last volume closed, this, the tenth volume of our serial, has been prepared according to the same general plan pursued in all the preceding volumes, the wisdom of experience not having demonstrated the necessity of any material departures. We have endeavored, as the number of the volumes in the publication increased, to add to its usefulness by compressing into the least possible amount of space those cases which constitute merely cumulative authority on well-settled principles, construe local statutes, or which, for any other reason, have no general value to the practitioner; thus giving greater prominence to the cases deciding new questions or amplifying previously settled legal propositions. The large number of cases of this character contained in the present volume emphasizes the value of this feature of the work, as well as demonstrates that there is a constant and appreciable growth in the Law of Real Property, notwithstanding the well-recognized stability of this branch of the law.

E. E. B.

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ABSTRACTS AND ABSTRACTERS.

EPITOME OF CASES.

Sec. 1. Duty and liability of abstractor—Right of purchaser to examine abstract. An abstractor is liable to a landowner for failure to exercise ordinary care in the examination of the title, although he is employed by the agent of such owner without any knowledge of the agency; but to create any liability, the principal must show that he relied on the abstractor. *Young v. Lohr*, 118 Ia. 624 (92 N. W. Rep. 684). In discussing the duty of an abstractor when abstracting tax proceedings, in the case of *Keuthan v. St. Louis Trust Co.*, 101 Mo. App. 1 (73 S. W. Rep. 334), the court say: "Where a conveyance of real property results from legal proceedings, and the official deed is only prima facie evidence of the recitals therein, as is a tax deed in this state, an examiner of title should do one of two things. He should either by marginal notes on his abstract call attention to the fact that the deed is but prima facie evidence of title, or he should examine the court proceedings, and ascertain for himself whether or not the court rendering the judgment had jurisdiction of the subject-matter and had also acquired jurisdiction of the person of the defendant, and that the parties to the suit and to the title are identical. *Warvelle on Abstracts*, p. 619. Such an examination would ordinarily be sufficient, if the record showed jurisdiction in the court to render the particular judgment, and the parties to the judgment and the title claimed under it to be identical in name and description, and it would not be negligent in the examiner to fail to make inquiry dehors the record to ascertain if there might not be some possible defect in the proceedings or error in the name or description of the parties." It will require a very clear contract to that effect to justify a construction that a purchaser who stipulates for an abstract of title, clear of incumbrances, is to pay the purchase money before he examines the abstract. *Pennsylvania Min. Co. v. Thomas*, 204 Pa. St. 325 (54 Atl. Rep. 101).

ABUTTING OWNERS.

EPITOME OF CASES.

Sec. 2. Signs and awnings—Abutter's rights—Municipal control. A provision in a city charter giving it power "to prevent or regulate the erection or construction of any * * * sign or any post or erection, or any projection, in, over or upon any street or avenue," authorizes an ordinance by such city prohibiting the erection of any stationary or swinging sign or other stationary awning shed across the whole or any portion of the sidewalks; and such an ordinance is not invalid because limited in its operation to a portion of the city only, or on account of its invading the rights of abutting owners. *State v. Inhabitants of City of Trenton*, 68 N. J. L. 501 (53 Atl. Rep. 202). The court say: "While we realize that such an ordinance may disturb somewhat, and perhaps annoy, the proprietors of business houses affected thereby, still it must be perceived that these erections may obstruct the streets in the congested centers of a populous city, and inconvenience large bodies of people who are entitled to the free and uninterrupted use of the streets for travel or passage. Regard must be had, also, to the fact that such erections, when largely multiplied, may mar the appearance of city streets, and may, through decay or want of repair, become unsightly, and perhaps unsafe to the pedestrian, and that they may obstruct the view, and to a degree, shut off light and air from persons residing upon the street in close proximity. These are questions that may justly be considered by the city authorities in deciding upon the propriety of such an ordinance, and hence we conclude that the prosecutors have failed to clearly demonstrate the charge that the ordinance is unreasonable.

With regard to the suggestion that the ordinance is inconsistent with the abutter's property interests, we think the proposition is clearly untenable. The title of the abutting owner may run to the center of the street, as it generally does,

but his rights must always be subservient to the public easement. He may make, as of right, all proper uses of the street, subject to the paramount right of the public user, and subject, also, to reasonable and proper municipal, and police regulation. 2 Dill. Mun. Corp. 656a; *Weller v. McCormick*, 52 N. J. L. 470 (19 Atl. Rep. 1101; 8 L. R. A. 798). In the latter case, Mr. Justice Dixon, in discussing the rights of the abutting owner, says 'He may use the highway in front of his premises, when not restricted by public enactment, for loading and unloading goods, for vaults and chutes, for awnings, for shade trees, etc., but only on condition that he does not unreasonably interfere with the safety of the highway for public travel.' No decision has been cited, and we know of none in this state, which asserts the doctrine that the exercise of such rights by the abutting owner is not subject to municipal control. Other authorities supporting this view are *Pedrick v. Bailey*, 12 Gray, 161; *Drake v. City of Lowell*, 13 Metc. (Mass.) 292; *City Council v. Burum*, 93 Ga. 68 (19 S. E. Rep. 820; 26 L. R. A. 340); *Farrell v. City of New York*, (Sup.) 5 N. Y. Supp. 580; *Id.* 672; and other cases cited in note 7 of 15 Am. & Eng. Enc. Law (2d. Ed.) 499. The case of *State v. Higgs*, 126 N. C. 1014 (35 S. E. Rep. 473; 48 L. R. A. 446), was cited in behalf of the prosecutors, where an ordinance forbidding the suspension of signs over sidewalks was held invalid, as not being within the chartered powers of the municipality. This decision was reached by a divided court, and is clearly distinguishable from the case we are considering."

Sec. 3. Ownership of fee—Rights of municipality—Abutter's right to soil and drainage. Where a municipality has the fee to public streets, with general power to regulate the use of the same, such municipality may lawfully authorize private corporations or individuals to erect electric light poles on its streets, and stretch wires upon them, in order to provide lights for its own use and that of its citizens, provided that in doing so they do not materially obstruct the ordinary use of the streets for public travel. *McWethy v. Aurora Elec. Light & Power Co.*, 202 Ill. 218 (67 N. E. Rep. 9). An abutting proprietor, owning to the center of the street, has the right to use the soil thereunder for all purposes consistent with the full enjoyment of the public easement. *Rawls v. Tallahassee Hotel Co.*, 43 Fla 288 (31 So. Rep. 237). An

abutting owner on a public road has the right to such advantage from it by way of drainage as is incidental to its existence, and does not inconvenience the public or individuals, or injure the public work. *Thom v. Dodge County*, 64 Neb. 845 (90 N. W. Rep. 763). An abutting owner owning the fee in a highway may dig a ditch thereon for the drainage of his lands, provided he does not interfere with the use of the highway, rendering it less safe, useful, or convenient for the public. *Nelson v. Fehl*, 203 Ill. 120 (67 N. E. Rep. 828).

Sec. 4. Right of abutting owner to recover for injury to property — Obstruction of highway. A city which wrongfully enters upon the property of an abutting owner or wrongfully or negligently throws earth or gravel thereon, while repairing its streets, is liable for the damages occasioned thereby, the same as an individual. *O'Donnell v. White*, 23 R. I. 318 (50 Atl. Rep. 333). In Maryland it is held that an abutting owner on a public highway which constitutes the only means of getting to and from his property may have an action against the county commissioners for maintaining a nuisance where such highway becomes and remains impassable on account of their negligence or persistent refusal to keep it in repair. *Bembe v. Commissioners of Anne Arundel County*, 94 Md. 321 (51 Atl. Rep. 179; 57 L. R. A. 279).

In the case of *Robinson v. Brown*, 182 Mass. 266 (65 N. E. Rep. 377), the supreme court of Massachusetts lays down the broad proposition that "An abutter on a public way cannot maintain an action for an obstruction to the way in that part of it which is not opposite his land, for the reason that in such a case his damage is not different in kind from that suffered by the public. This proposition is too well settled to admit of discussion, or to require any further statement"; and in this case the court holds that the proximity of an obstruction to an abutter does not change the rule. But in Indiana it is held that an abutting owner may recover damages from one who erects a building on a street within two hundred feet of such abutting owner's property and which permanently obstruct access to such property from one direction and deprives him of his usual and only direct access to the business portion of the town. *O'Brien v. Central Iron & Steel Co.*, 158 Ind. 218 (63 N. E. Rep. 302; 57 L. R. A. 508; 92 Am. St. Rep. 305). In the course of its opinion, the court say:

"The abutter has a right, in common with the community, to use the street from end to end for the purpose of passage; but, in addition to this common right, he has an individual property right, appendant to his premises, in that part of the street which is necessary to free and convenient egress and ingress to his property. That this latter right is private and personal, and unshared by the community, and cannot be taken away, or materially interfered with, without the wrongdoer being answerable in damages, has been many times declared by this court."

Sec. 5. Railroads in streets—Contracts, ordinances and statutes. The laying of a railroad track in a city street by a private corporation without a proper franchise, is a public nuisance which may be enjoined by an abutting owner specially damaged. See opinion for construction of Washington statutes as to who owns the fee in public streets. *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21 (69 Pac. Rep. 362). The extent of the right conferred upon a railroad company by an agreement by an abutting owner giving his consent to the use of the street for the road depends on the circumstances existing at the time of the agreement, and it does not include the right to build additional tracks switches or sidings. *Stephens v. New York, O. & W. Ry. Co.*, 175 N. Y. 72 (67 N. E. Rep. 119). A grant by a municipality to a railroad company to build its road upon or across a street confers no right to destroy the street, or to have exclusive use of it, but contemplates a joint use of the street by the public and the company, and the municipality has power to enforce a proper use of the grant, and may restrict the company to the use of only so much of the street as is absolutely necessary for its use, and consistent with the public use, and may compel a change of location or total removal of a side track materially impairing the use of the street by rendering the part assigned for public passage too narrow. *Town of Mason v. Ohio River R. Co.*, 51 W. Va. 183 (41 S. E. Rep. 418). A municipality having the fee of public streets, with power to do anything with, or allow any use of, such streets, which is not incompatible with the ends for which they were established may grant owners of lumber and gravel yards permits to lay tracks in the street, to connect them with the main line of a railroad. *People v. Blocki*, 203 Ill. 363 (67 N. E. Rep. 809). Streets, the dedication of which has not been completed by the proper

acceptance, do not come within the meaning of a statute (N. J. Laws 1893, p. 302; Gen. Stat. 3235) requiring consent from the municipality and abutting owners before a traction company can lay its tracks therein. *Pease v. Paterson & State Line Traction Co.*, N. J. L. (54 Atl. Rep. 524).

Sec. 6. Railroads in streets—Recovery of damages by abutting owner. Damages occasioned to abutting property by noise, smoke and soot created by passing trains may be considered. *Calumet & C. Canal & Dock Co. v. Morawetz*, 195 Ill. 398 (63 N. E. Rep. 165). As to the right to recover damages for noise, see *Baker v. Boston El. Ry. Co.*, 183 Mass. 178 (66 N. E. Rep. 711). An abutting owner is entitled to recover damages for the diminution in the rental value of his property, or its value for the uses to which it is adapted, to the extent such injury is special and peculiar as distinguished from that suffered in a greater or less degree by the public generally. *Bailey v. Boston & P. R. Corp.*, 182 Mass. 537 (66 N. E. Rep. 203). A railroad company which has acquired, as against abutting owners, the right to maintain its tracks in a city avenue is not liable for subsequent damages accruing to such owners by reason of any interference with their easements of light, air and access, resulting from the construction of a steel viaduct by such company made necessary in order for it to comply with a statute requiring it to change its grade,—the state having power to make such changes without any additional compensation. *Muhlker v. New York & H. R. Co.*, 173 N. Y. 549 (66 N. E. Rep. 558). A railroad company occupying a street with temporary tracks in order to establish elevated tracks over grade crossings is liable for damages resulting to an abutting owner from such use of the street, although the improvement is being made by the company at the command of the state and under an agreement with its representatives that the company should "have the free use of such streets or portions of streets and the right to temporarily close such streets as may be necessary for the convenient prosecution of the work." *McKeon v. New York, N. H. & H. R. Co.*, 75 Conn. 341 (53 Atl. Rep. 656; 61 L. R. A. 730). See opinion as to elements considered in determining the damages in such a case. Construing and applying Mass. Pub. Stat., ch. 112, § 95, providing that a railroad company "shall pay all damages occasioned by laying out,

making and maintaining its road, or by taking land or materials therefor," it is held that where a railroad company in making a change in the grade of a public street completely closed up, for a period of several months, access and egress to and from the property of an owner abutting on another part of the street, is liable to him for damages where he had no means of access to other streets, and was deprived of the use of his property. *Putnam v. Boston & P. R. Corp.*, 182 Mass. 351 (65 N. E. Rep. 790). The company constructing a railroad in a street and thereby obstructing the ingress and egress of an abutting lot owner, is a necessary party to an action by him for such injury, though at the time of the action another company is operating the road as lessee, *Atchison, T. & S. F. R. Co. v. Anderson*, 65 Kan. 202 (69 Pac. Rep. 158). In an action to recover damages caused by the construction and maintenance of an elevated road, evidence of sales and rentals of specific pieces of property, other than the property in suit, is inadmissible. *Robinson v. New York El. Ry. Co.*, 175 N. Y. 219 (67 N. E. Rep. 431).

Sec. 7. Street railroads. A municipality granting a street railway the right to lay tracks in its streets, on condition that the company shall forfeit such right unless it constructs a certain extension within a specified time, may remove the tracks upon the company's failure to comply with the condition. *Minersville Borough v. Schuylkill Electric Co.*, 205 Pa. St. 394 (54 Atl. Rep. 1050). The consent of owners of a majority of the feet frontage on a street, which is required by the statute of Ohio as a prerequisite to the construction and operation of a street railroad on such street, are not property rights which can be appropriated under the power of eminent domain. The owners of abutting lots are free to give or withhold such consent, upon such terms as to them severally may seem proper, and there is no public policy against giving such consent for a valuable consideration moving from the street railroad company to such lot owner. *Hamilton, G. & C. Traction Co. v. Parish*, 67 O. St. 181 (65 N. E. Rep. 1011; 60 L. R. A. 531). Mo. Rev. Stat. 1889, § 1825 does not give an abutting owner any new right to damages on account of the construction of a street railroad in the street, and he is only entitled to damages peculiar to his property and not com-

mon to all abutting owners. *Nagel v. Lindell Ry. Co.*, 167 Mo. 89 (66 S. W. Rep. 1090). *N. J. Laws* 1894, p. 374; 1896, p. 329, construed and applied—construction and operation of street railroads—abutter's consent. *Mercer County Traction Co. v. United New Jersey R. & Canal Co.*, 64 N. J. Eq. 588 (54 Atl. Rep. 819); *State v. Mayor, etc., of East Orange*, N. J. L. (53 Atl. Rep. 1047). Construing and applying W. Va. Const., art. 3, § 9, it is held that an abutting owner can not enjoin the construction of a street railway in a street until the damage to his property resulting from such use of the street is ascertained and paid or secured, unless the injury to his property is so great as to destroy its value, and therefore amounts to a virtual taking of the property for the use of the railway company. *Watson v. Fairmont & S. Ry. Co.*, 49 W. Va. 528 (39 S. E. Rep. 193). For a discussion of the power of a municipality to repeal an ordinance granting the use of streets to a street railway, and how it may be exercised, see *Snouffer v. Cedar Rapids & M. City Ry. Co.*, 118 Ia. 287 (92 N. W. Rep. 79).

Sec. 8. Street railroads—Rights of traveler as to parts of street occupied by street railroad tracks. A traveler having occasion to use for a legitimate purpose that part of a public street occupied by the tracks of a street railroad, does not render himself a trespasser by placing himself or his horse and vehicle on such tracks, unless he unreasonably and unnecessarily obstructs their use by the railroad company. *McFarland v. Consolidated Traction Co.*, 204 Pa. St. 615 (54 Atl. Rep. 308). The court say: "A street car company has not the exclusive right to the use of a street on which it operates its road, nor has it such right to its own tracks. The streets of the municipalities of the state are for the use of the traveling public, and the right of the street railway company to use them is in common with the public. The street railway company and the public are alike liable for the negligent use of the street; each must exercise its rights thereon with care and a due regard for the rights of the other. While, for reasons which are apparent, a street car company must have a superior right to use its tracks in the operation of its road, yet this does not forbid their use by the public, but only requires that in their use the right of the public, under certain circumstances, shall be subordinate to that of the railway company."

Sec. 9. Trees in streets and highways. A growing tree within the limits of a sidewalk, and which constitutes an obstruction to the free use thereof, may be removed by the municipal authorities in the course of street improvements. *Hildrup v. Town of Windfall City*, 29 Ind. App. 592 (64 N. E. Rep. 942). A complaint by an abutting owner on a highway for cutting trees therein which fails to allege his ownership in fee of the highway and that the trees were on his side of it is insufficient. *Western Union Tel. Co. v. Krueger*, 30 Ind. App. 28 (64 N. E. Rep. 635).

Sec. 10. Change of grade—Municipal liability—Statutes construed. The liability of a city for injury to abutting property by change in the grade of the street, does not extend to the tortious acts of its servants committed in connection with such work, and which are not proximately connected with the work incident to such improvement. *Roughton v. City of Atlanta*, 113 Ga. 948 (39 S. E. Rep. 316). An abutter on a public road who sues a county for damages sustained on account of a change in the grade of the road must show that the alleged change was made under the authority of the officers of the county who were empowered by law to do the work complained of. *Bibb County v. Reese*, 115 Ga. 346 (41 S. E. Rep. 636). An abutting owner may recover damages resulting to his property from a change of the grade of a street occasioned by a railroad elevating or lowering its tracks in pursuance of an ordinance passed by a municipality in the exercise of its police power. *City of Chicago v. Jackson*, 196 Ill. 496 (63 N. E. Rep. 1013); *City of Chicago v. Lonergan*, 196 Ill. 518 (63 N. E. Rep. 1018). The measure of damages is the difference between the market value of the property injuriously affected, before and after the change in the grade of the street was made. *Roughton v. City of Atlanta*, 113 Ga. 948 (39 S. E. Rep. 316); *City of Denver v. Bonesteel*, 30 Colo. 107 (69 Pac. Rep. 595); *Tegeler v. Kansas City*, 95 Mo. App. 162 (68 S. W. Rep. 953).

Applying Colo. Const., art. 2, § 15, providing "that private property shall not be taken or damaged, for public or private use, without just compensation," it is held that a city is liable for damages resulting to an abutting owner from its change in a previously established grade, in reliance upon which he had improved his property. *City of Denver v. Bonesteel*, 30 Colo. 107 (69 Pac. Rep. 595). See opinion for

collation of authorities and discussion of this subject. The right of an abutting owner to recover damages from a municipality for change in the grade of a street does not exist in the absence of a statute conferring such right. Ia. Code, § 785, does not give an abutting owner making improvements in accordance with the natural grade of a street after a city ordinance establishing its grade, an action for injuries to the property resulting from the action of the city in afterwards bringing the street to the established grade. *Farmer v. City of Cedar Rapids*, 116 Ia. 322 (89 N. W. Rep. 1105). To the same effect, see *Reilly v. City of Ft. Dodge*, 118 Ia. 633 (92 N. W. Rep. 887). An abutting owner may have an action against a city for damages resulting to his property by a change of grade in the street made by such city in a manner not conforming to the provisions of its charter. *Fuller v. City of Mt. Vernon*, 171 N. Y. 247 (63 N. E. Rep. 964). Damages resulting to abutting property from the change in the grade of the street, are within Minn. Const., art. 1, § 13, as amended in 1896, providing that "private property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured." *Dickerson v. City of Duluth*, 88 Minn. 288 (92 N. W. Rep. 1119). Citing, *City of Vicksburg v. Herman*, 72 Miss. 217 (16 So. Rep. 434); *City Council of Montgomery v. Townsend*, 80 Ala. 489 (2 So. Rep. 155; 60 Am. Rep. 112); *Same v. Maddox*, 89 Ala. 181 (7 So. Rep. 433); *Reardon v. City and County of San Francisco*, 66 Cal. 492 (6 Pac. Rep. 317; 56 Am. Rep. 109); *Eachus v. Railway Co.*, 103 Cal. 614 (37 Pac. Rep. 750; 42 Am. St. Rep. 149) and cases cited; *Smith v. Floyd Co.*, 85 Ga. 420 (11 S. E. Rep. 850); *Pause v. City of Atlanta*, 98 Ga. 98 (26 S. E. Rep. 489; 58 Am. St. Rep. 290); *Spencer v. Railway Co.*, 120 Mo. 154 (23 S. W. Rep. 126; 22 L. R. A. 668). Under Vt. Stat., §§ 3357, 3358, an abutting owner on a highway can claim damages for a change in the grade thereof only to the extent such change exceeds three feet. *Fairbank v. Town of Rockingham*, 75 Vt. 221 (54 Atl. Rep. 186).

Sec. 11. Alteration or vacation of street. The closing of a street so as to make it a cul de sac immediately in front of an abutting owner's property, and thus cut off its connection with other streets, inflicts such a special injury upon him as entitles him to damages; and the measure of his damages is the difference between the fair cash market value of his

premises before and after the closing. *Village of Winnetka v. Clifford*, 201 Ill. 475 (66 N. E. Rep. 384). Construing and applying Burns' Ind. Rev. Stat., §§ 3647-3650, it is held that a person competent to object to the vacation of a street, as a property owner, must be a property owner immediately upon the street or the part thereof to be vacated. *Hall v. City of Lebanon*, 31 Ind. App. 265 (67 N. E. Rep. 703). A general statutory provision (N. H. Pub. Stat., ch. 72, § 4) that "the damages sustained * * * by the discontinuance of a highway * * * may be assessed," does not authorize the awarding of damages to an abutting owner, in front of whose property the highway is left undisturbed, on account of the discontinuance of other portions of the highway rendering access to his property more circuitous and thus resulting in a diversion of travel and a diminution of trade. *Cram v. City of Laconia*, 71 N. H. 41 (51 Atl. Rep. 635; 57 L. R. A. 282). Neb. Comp. Stat., ch. 14, art. 1, § 69, subds. 27, 28, construed and applied—vacation of streets and alleys by village board. *Village of Bellevue v. Bellevue Imp. Co.*, Neb. (90 N. W. Rep. 1002).

Sec. 12. Assessments against abutting owners for municipal improvements—Constitutionality and construction of statutes. The constitutionality of Burns' Ind. Rev. Stat. § 4288 et seq.,—the "Barrett Law," is again reaffirmed. *Pittsburg, C. C. & St. L. Ry. Co. v. Fish*, 158 Ind. 525 (63 N. E. Rep. 454). See opinion in above case for construction of provision of the statute as to allowance of attorney's fees. Construing and applying §§ 4290, 4293, 4294 of this statute, it is held that lots on both sides of a street should be assessed for an improvement lying entirely on one side of the center of the street. *Klein v. Nugent Gravel Co.*, Ind. App. (66 N. E. Rep. 486). The constitutionality of Mo. Laws 1893, pp. 90, 92 §§ 108, 110, authorizing the apportionment of the cost of a street improvement by "the front foot rule," is reaffirmed in the *City of St. Charles v. Deemar*, 174 Mo. 122 (73 S. W. Rep. 469). New Jersey recognizes the constitutionality of this system. *State v. City of Ocean City*, 67 N. J. L. 215 (50 Atl. Rep. 621). A statute (Mich. Local Laws 1895, Act. No. 443) making a railroad company personally liable for a previous assessment for which it was not so liable, is unconstitutional. *City of Grand Rapids v. Lake Shore & M. S. Ry. Co.*, 130 Mich. 238 (89 N. W. Rep. 932). A.

statute authorizing a city, when building a sewer, to construct the necessary house connections from the sewer to the curb line of the lots fronting the street, and to charge the cost and expenses of such house connections to the lots particularly benefitted thereby, and to assess the same at the time of assessing the sewer proper, is constitutional. *State v. Mayor, etc., of City of Paterson*, 67 N. J. L. 455 (51 Atl. Rep. 922). Kan. Gen. Stat. 1901, §§ 729, 737, construed and applied—assessment of unplatted land. *McGrew v. City of Kansas City*, 64 Kan. 61 (67 Pac. Rep. 438).

Sec. 13. Assessments against abutting owners for municipal improvements—Property subject to. In an opinion containing an elaborate discussion of the subject, the supreme court of Pennsylvania hold that statutes imposing assessments for local improvements are enacted in the exercise of the taxing power, and do not apply to property held or used for public purposes by the state or any of its political subdivisions, unless the statute expressly so declares. Pa. Pub. Laws, 1891, p. 69 construed and applied. *City of Pittsburgh v. Sterrett Subdistrict School*, 204 Pa. St. 635 (54 Atl. Rep. 463; 61 L. R. A. 183). Citing, *City of Clinton v. Henry County*, 115 Mo. 557 (22 S. W. Rep. 494; 37 Am. St. Rep. 415); *Board of Improvement v. School Dist.*, 56 Ark. 354 (19 S. W. Rep. 969; 16 L. R. A. 418; 35 Am. St. Rep. 108); *City of Hartford v. West Middle District*, 45 Conn. 462 (29 Am. Rep. 687); *Witter v. Mission School District*, 121 Cal. 350 (53 Pac. Rep. 905; 66 Am. St. Rep. 33). But in Iowa it is held that a statute (McClain's Code, § 1271) exempting the property of a county farm from taxation, does not exempt it from a special assessment for street improvements. *Edwards & Walsh Const. Co. v. Jasper County*, 117 Ia. 365 (90 N. W. Rep. 1006; 94 Am. St. Rep. 301).

Sec. 14. Assessments against abutting owners for municipal improvements—Miscellaneous notes. The fact that the paving of a street increases the facility with which fire protection can be afforded to property may be considered in assessing it. *Chicago Union Traction Co. v. City of Chicago*, 202 Ill. 576 (67 N. E. Rep. 383). The owner of lots is not estopped to maintain injunction to restrain the sale of such lots under an illegal special assessment made to pay for the building of the sidewalk because he did not commence his

action before the improvements were made, when it is alleged and admitted that prior to the commencement of the work he served written notices on the mayor, street commissioner, and contractors not to build such walk, and that he would not be responsible therefor. *Keys v. City of Neodesha*, 64 Kan. 681 (68 Pac. Rep. 625). For discussion of what constitutes an estoppel against the assertion of the invalidity of an assessment, see *Batty v. City of Hastings*, 63 Neb. 26 (88 N. W. Rep. 139). The right of a city to collect an assessment for improvements cannot be barred by the statute of limitations or prejudiced by the laches or omission of duty of a public officer. *Mcartney v. People*, 202 Ill. 51 (66 N. E. Rep. 873). An assessment by a municipality for paving a street is a tax, and cannot be collected as an ordinary debt by a common-law action, unless such remedy is given by statute. *City of Franklin v. Hancock*, 204 Pa. 110 (53 Atl. Rep. 644). In Indiana it is held that where benefits have been assessed against property it will be conclusively presumed, as against a collateral attack, that the damages, if any, have been estimated, and deducted from the aggregate amounts of debts. The assessment is against the property; there is no personal liability. *Gaslight & Coke Co. v. City of New Albany*, 158 Ind. 268 (63 N. E. Rep. 458).

ACKNOWLEDGMENTS.

EPITOME OF CASES.

Sec. 15. Who may take acknowledgments—Instruments executed to corporations. One who is the real owner of a note to secure which a mortgage is given to another is disqualified from taking the acknowledgment of the mortgage. *Hedbloom v. Pierson*, (Neb.) 90 N. W. Rep. 218. The supreme court of Ohio adheres to the doctrine that the act of an officer taking and certifying an acknowledgment is ministerial, and, therefore, the acknowledgement of a mortgage given to a corporation is not invalid because the officer taking it was a stockholder in the corporation. *Read v. Toledo Loan Co.*,

68 O. St. 280 (67 N. E. Rep. 729; 96 Am. St. Rep. 663). In Alabama it is held that the fact that a notary public taking the acknowledgment of a mortgage executed to a corporation was a stockholder therein, renders the instrument invalid only upon direct attack, and not when collaterally assailed. *National Bldg. & Loan Ass'n v. Cunningham*, 130 Ala. 539 (30 So. Rep. 335).

The acknowledgment of a mortgage executed to one for the benefit of a bank taken before its cashier, who is also a stockholder in the bank is void, *First Nat. Bank v. Citizens' State Bank*, Wyo. (70 Pac. Rep. 726); and so is an acknowledgment of a mortgage given to a building and loan association, taken by a notary public who is a stockholder in the association. *Ogden Bldg. & L. Ass'n v. Mensch*, 196 Ill. 554 (63 N. E. Rep. 1049; 89 Am. St. Rep. 330). The court say: "It has been held that an acknowledgment of an instrument before an officer who is a party to the instrument, or is interested beneficially therein, is a void acknowledgment, by the courts of last resort in Virginia—*Davis v. Beazley*, 75 Va. 491; *Bowden v. Parrish*, 86 Va. 67 (9 S. E. Rep. 616; 19 Am. St. Rep. 873); *Association v. Groves*, 96 Va. 138 (31 S. E. Rep. 23),—California—*Bank v. Rosenthal*, 99 Cal. 39 (31 Pac. Rep. 849; 33 Pac. Rep. 732),—Maine—*Beaman v. Whitney*, 20 Me. 413,—Iowa—*Bank v. Radtke*, 87 Ia. 363 (54 N. W. Rep. 435); *Wilson v. Traer*, 20 Ia. 231; *Smith v. Clark*, 100 Ia. 605 (69 N. W. Rep. 1011),—Mississippi—*Wasson v. Connor*, 54 Miss. 351; *Jones v. Porter*, 59 Miss. 628,—Texas—*Brown v. Moore*, 38 Tex. 645; *Miles v. Kelley*, 16 Tex. Civ. App. 147 (40 S. W. Rep. 599),—North Carolina—*Long v. Crews*, 113 N. C. 256 (18 S. E. Rep. 499),—Michigan—*Groesbeck v. Seeley*, 13 Mich. 329,—Alabama—*Griffith v. Ventress*, 91 Ala. 366 (8 So. Rep. 312; 11 L. R. A. 193; 24 Am. St. Rep. 918); *Hayes v. Association*, 124 Ala. 663 (26 So. Rep. 527; 82 Am. St. Rep. 216),—Florida—*Bank v. Rivers*, 36 Fla. 575 (18 So. Rep. 850),—Nebraska—*Horbach v. Tyrrell*, 48 Neb. 514 (67 N. W. Rep. 485; 37 L. R. A. 434),—Connecticut—*Association v. Spencer*, 26 Conn. 195,—West Virginia—*Tavener v. Barrett*, 21 W. Va. 681,—Missouri—*Dail v. Moore*, 51 Mo. 589,—Kansas—*Wills v. Wood*, 28 Kan. 400,—and Indiana—*Hubble v. Wright*, 23 Ind. 323. In *Kothe v. Krag-Reynolds Co.*, 20 Ind. App. 293 (50 N. E. Rep. 594), it was held that an acknowledgment of a mortgage to secure an indebtedness to an incorporated company, taken before a

notary public who was a stockholder in the corporation, was void. This decision is based in part upon provisions of the statute of the state of Indiana; but the question was exhaustively treated and discussed by the court irrespective of the statute, and the conclusion announced that upon principles of public policy, and according to the very great weight of authority, an officer who has a pecuniary interest in the debt intended to be secured by a mortgage is disqualified from certifying that the mortgage was acknowledged before him by the makers thereof. We should here acknowledge that we have been greatly aided in the examination of this question by the citation of authorities collected by the writer of the opinion in the cast last referred to. The authors of various works on mortgages and chattel mortgages, so far as the question is discussed by them, declare that it is against the policy of the law that any officer who is beneficially interested in the validity and binding force of a mortgage should take and certify to the acknowledgment thereof. *Herm. Chat. Mortg.* § 28; *Jones, Chat. Mortg.* § 249; *Ping. Chat. Mortg.* 216. In *Hammers v. Dole*, 61 Ill. 307, we held that a justice of the peace was disqualified to acknowledge a chattel mortgage to secure a debt payable to himself and others, though, under the law as it then stood, he was the only justice of the peace who could lawfully acknowledge the mortgage. We there said; 'The mortgage of appellants was void as to appellees. It was acknowledged before one of the mortgagees, who was a justice of the peace. This is against the policy of the law. An officer should not be permitted to perform either a ministerial or a judicial act in his own behalf.' In *Darst v. Gale*, 83 Ill. 136, the validity of an acknowledgment to a trust deed taken by an officer who was named as one of the trustees was involved, and we there said (page 143): 'The acknowledgment was taken by Grove, one of the parties named as trustees. This unquestionably rendered the deed void as to him, but we fail to comprehend how it adversely affected the deed as to the other trustees. He and they had no community of interest, and his becoming disqualified had no tendency to disqualify them. In 1 *Cycl. Law & Proc.* p. 555, upon the authority of a number of adjudicated cases there cited, the author of the article on 'Acknowledgments' declares the rule as follows: 'The acknowledgment of an instrument in which a corporation is interested financially cannot be taken by a stockholder in such corporation.' In *Association v. Groves* 96 Va. 138 (31

S. E. Rep. 23); *Bank v. Rosenthal*, 99 Cal. 39 (31 Pac. Rep. 849; 33 Pac. Rep. 732); *Hayes v. Association*, 124 Ala. 663 (26 So. Rep. 527; 82 Am. St. Rep. 216); *Smith v. Clark*, 100 Ia. 605 (69 N. W. Rep. 1011); *Miles v. Kelley*, 16 Tex. Civ. App. 147 (40 S. W. Rep. 559), and *Bank v. Rivers*, 36 Fla. 575 (18 So. Rep. 850), acknowledgments taken by officers who were also stockholders in corporations who were the grantees or mortgagees in the instruments so purported to be acknowledged were held to be void on the ground the officers taking the acknowledgments were disqualified to take the same by reason of their interest as holders of shares of the capital stock of the corporations. The cases of *Cooper v. Association*, 97 Tenn. 285 (37 S. W. Rep. 12; 33 L. R. A. 338; 56 Am. St. Rep. 795); *Bank v. Conway*, 17 Fed. Cas. 1202; *Horton v. Society*, 6 Wkly. Law Bul. 141, and *Lynch v. Livingston*, 6 N. Y. 422, are relied upon to support the view that an officer is not disqualified, by reason of interest, to take and certify an acknowledgment to a deed or mortgage. The ground of the decisions in the cases so relied upon, except that of the supreme court of Tennessee, is that the act of taking an acknowledgment is ministerial only, and that an interested person is not disqualified from discharging a mere ministerial act. The supreme court of Tennessee, in the decision referred to, regards the act of taking an acknowledgment as a judicial or quasi judicial act, and though it declares acknowledgments taken before officers who are interested in the instrument 'are contrary to public policy, and by no means to be encouraged, and while the practice, which has become so prevalent, should be discountenanced and discouraged,' still holds such acknowledgments should not be declared per se void, but, to quote again from the opinion of the court, 'are open to attack, and the court will lend a ready ear to evidence of undue advantage, fraud, or oppression arising out of the fact of such relationship or interest in the officer taking the acknowledgment.' In the position thus assumed it is believed the supreme court of the state of Tennessee stands alone. The case is probably an exemplification of the adage that 'hard cases make bad precedents.' As to the contention advanced by the other of such cases, that acknowledgments of the character under consideration may be upheld on the ground they are ministerial acts only, it is not necessary to say these cases seem to stand opposed to an overwhelming current of adverse authority and to the better reasoning upon the point. Nor can such

view be harmonized with the ruling of this court in *Snydacker v. Brosse*, 51 Ill. 357 (99 Am. Dec. 551), and *O'Conner v. Wilson*, 57 Ill. 226, that an officer cannot legally perform the merely ministerial act of executing process in a case in which he is interested, nor the expression of this court in *Hammers v. Dole*, 61 Ill. 307, heretofore quoted, that: 'The mortgage of appellants was void as to appellees. It was acknowledged before one of the mortgagees, who was a justice of the peace. This is against the policy of the law. An officer should not be permitted to perform either a ministerial or a judicial act in his own behalf.'

Sec. 16. Form and sufficiency of certificate—Curative statutes. A certificate of acknowledgment to a deed signed by one "Arnall," stating that one "Arnold," party to the foregoing instrument, duly acknowledges the signing and delivery of the instrument, was held sufficient. *Arnall v. Newcom*, 29 Tex. Civ. App. 521 (69 S. W. Rep. 92). Ark. Laws 1893, p. 66, validating defective acknowledgments, does not validate an acknowledgment of a deed of trust made by a grantor before the trustee named therein, in his official capacity of notary public. *Meunse v. Harper*, 70 Ark. 309 (67 S. W. Rep. 869). For construction of curative act, Mar. 11, 1891, see *Seawel v. Dirst*, 70 Ark. 166 (66 S. W. Rep. 1058); act Apr. 13, 1893, *Farmers' Sav. Bldg. & Loan Ass'n v. Berger*, 70 Ark. 613 (69 S. W. Rep. 57). Ill. Laws 1851, p. 122 construed and applied—validating acknowledgments taken before justice of peace of county other than that in which the land lies. *Stallford v. Goldring*, 197 Ill. 156 (64 N. E. Rep. 395).

Sec. 17. Conclusiveness of certificate. For a discussion of what evidence is necessary to impeach an officer's certificate of acknowledgment, see, *Adams v. Smith*, Wyo. (70 Pac. Rep. 1043); *Gritten v. Dickerson*, 202 Ill. 372 (66 N. E. Rep. 1090). In the last case the court say: "This court has held that the uncorroborated testimony of the grantor, or party executing a deed, is not sufficient to overcome the evidence afforded by the officer's certificate of acknowledgment. Clear and satisfactory proof is required to impeach a certificate of the acknowledgment of a deed. It is not sufficient that the testimony of a grantor as to the nonexecution of the deed should be slightly corroborated. The proof, to sustain the charge that such certificate of acknowledgment is

untrue and fraudulent, 'must be of the clearest, strongest, and most convincing character, and be by disinterested witnesses.' *Sassenberg v. Huseman*, 182 Ill. 341 (55 N. E. Rep. 346), and cases there referred to; *Oliphant v. Liversidge*, 142 Ill. 160 (30 N. E. Rep. 334), and cases there referred to; *Davis v. Howard*, 172 Ill. 340 (50 N. E. Rep. 258). In *Russell v. Baptist Theological Union*, 73 Ill. 337, we said (page 341): 'It is a rule that the acknowledgment of a deed cannot be impeached for anything but fraud, and in such cases the evidence must be clear and convincing beyond a reasonable doubt; and, whilst the making of a false certificate would be a fraud on the party against whom it is perpetrated, there is in favor of the officer the fact that he is under his official oath when he grants the certificate and the liability to indictment, conviction, and infamy is certainly a strong incentive to truthful and honest action as is the restraint imposed on an interested witness, struggling for the gain following success in a suit, and escaping loss by defeat. Hence the mere evidence of the party purporting to have made the acknowledgment cannot overcome the officer's certificate. Nor will it be with slight corroboration.' "

Sec. 18. Married woman's certificate. Construing and applying N. J. Laws 1898, p. 685 § 39, providing that a wife's acknowledgment of a conveyance of any interest in lands must be made by her in a private examination apart from her husband, "that she signed, sealed and delivered the same as her free act and deed, freely, without any fear, threats or compulsion of her husband," it is held that an officer cannot properly refuse to certify a wife's acknowledgment to a conveyance of her husband's land on account of her stating to such officer that she did not execute it "freely," but declared that she executed it "without any fear, threats of compulsion of her husband," where it appears that the deed was being made in pursuance of a previous written contract entered into by the husband and wife to execute such a conveyance of the lands, and which had been acknowledged by her without any equivocation. *Goldstein v. Curtis*, 63 N. J. Eq. 454 (52 Atl. Rep. 218). N. C. Laws 1889, ch. 389, construed and applied—private examination of married woman. *Benedict v. Jones*, 129 N. C. 470 (40 S. E. Rep. 221).

ADVERSE POSSESSION.

EPITOME OF CASES.

Sec. 19. As to what constitutes adverse possession—
General principles. One claiming title by adverse possession must show that he occupied adversely and as owner during the entire prescriptive period. *Knight v. Denman*, 64 Neb. 814 (90 N. W. Rep. 863); *Beer v. Dalton*, (Neb.) 92 N. W. Rep. 593. Possession, in order to constitute a bar, must be an actual possession of some part of the land in dispute, and possession not within the bounds of the disputed part is not sufficient to authorize the bar of the statute. *Elliott v. Cumberland Coal & Coke Co.*, 109 Tenn. 745 (71 S. W. Rep. 749). In Nebraska it is held that possession may be adverse, though the claimant occupies under a mistaken belief that the land is actually part of another tract, and that the true boundary is different than it really is. *Baty v. Elrod*, Neb. (92 N. W. Rep. 1032). Title by adverse possession cannot arise out of a permissive possession. *Hicks v. Swift Creek Mill Co.*, 133 Ala. 411 (31 So. Rep. 947; 57 L. R. A. 720; 91 Am. St. Rep. 38). If one enters upon land with the owner's permission, expecting merely that the owner will give it to him in the future, such entry and permission will not constitute a hostile holding. *McClenahan v. Stevenson*, 118 Ia. 106 (91 N. W. Rep. 925). Citing, *Commonwealth v. Gibson*, 85 Ky. 666 (4 S. W. Rep. 453); *Potts v. Coleman*, 67 Ala. 221; *Comins v. Comins*, 21 Conn. 413. One in the adverse occupancy of land is not required to give notice of his claim to the owner in words; it is sufficient if his occupancy and use are exclusive, open and notorious and of such a character as to indicate to the owner that it was as a matter of right. *Jangraw v. Mee*, 75 Vt. 211 (54 Atl. Rep. 189). Where one's entry on government lands as a homestead claim is cancelled by the government without any notice to him and the title passes to a railroad company, his subsequent continuance in possession of the land for a long term of years, cul-

tivating the same, planting an orchard and erecting buildings thereon, accompanied by payment of taxes, will be held to be adverse. *Wilbur v. Cedar Rapids & M. R. Ry. Co.*, 116 Ia. 65 (89 N. W. Rep. 101). The cutting of timber on uninclosed wild lands, without anything to define the extent of the alleged claim, is not, alone, such evidence of ownership as to amount to possession adverse to the true owner. *Travers v. McElvain*, 200 Ill. 377 (65 N. E. Rep. 623). The seven years adverse possession of land under written evidence of title necessary to give a perfect legal title under the statute of Georgia, must be so notorious as to attract the attention of adverse claimants, and so exclusive as to prevent actual occupancy by another. Continuous use and occupancy for the time required by law for the purpose of range for cattle and hogs, and repeated occupation for the purpose of cutting timber, is not sufficient; and this is true though the lands are so situated as to be unfit for actual physical residence, and unfit for cultivation, and suitable only for the purposes above named. *McCook v. Crawford*, 114 Ga. 337 (40 S. E. Rep. 225). The inclosure, cultivation and improvement mentioned in *Wis. Rev. Stat. 1898*, § 4214, as elements of adverse possession are, at most, evidence of such possession and occupancy; and there may be such actual occupancy and possession as will give title by adverse possession without such inclosure, cultivation or improvement. *Batz v. Woerpel*, 113 Wis. 442 (89 N. W. Rep. 516). See opinion for application of this rule to particular facts. For a discussion of how title may be acquired by adverse possession in Arizona, see *Goldman v. Sotelo*, *Ariz.* (68 Pac. Rep. 558).

Sec. 20. As to what constitutes adverse possession—
Particular cases. The placing of a fence around a spring on the land of another, but which is not so constructed as to exclude others, and the taking of water from the spring in a manner consistent with a temporary use, do not constitute such adverse possession as will confer title to the spring. *Hunter v. Emerson*, 75 Vt. 173 (53 Atl. Rep. 1070). Where a deed to a purchaser of lands at foreclosure of a mortgage given by one having a life estate therein and who was also executrix to secure a personal loan, purports to convey a fee and he takes and holds possession thereunder, claiming such an estate for the prescriptive period, the executrix's right to recover the land is barred. *Webb v. Winter*, 135 Cal. 455

(67 Pac. Rep. 691). An entry upon the land and the erection of insignificant improvements thereon by a squatter, knowing the title thereto to be in litigation and that part of the land is occupied by the owner, and who makes no claim of title, is not such a disseisin as will make his possession adverse so as to give him title after the expiration of ten years, under Bal. Ann. Wash. Codes & Stat., § 4797. *Blake v. Shriver*, 27 Wash. 593 (68 Pac. Rep. 330). For particular fact cases as to sufficiency of evidence to sustain a claim of title by adverse possession, see *Dewitt v. Shea*, 203 Ill. 393 (67 N. E. Rep. 761; 96 Am. St. Rep. 311); *Gilman v. Brown*, 115 Wis. 1 (91 N. W. Rep. 227); *Glover v. Sage*, 87 Minn. 526 (92 N. W. Rep. 471); *Brown v. Hartford*, 173 Mo. 183 (73 S. W. Rep. 140).

Sec. 21.—Proof of adverse possession. It is incumbent upon one who relies upon an adverse possession to extinguish the legal title to establish the necessary facts by clear and necessary evidence. All presumptions are in favor of the legal holder, and the burden of overcoming them rests with him who assails the legal title. *Evans v. Welch*, 29 Colo. 355 (68 Pac. Rep. 776). In South Carolina it is held that in order to establish a title to real estate, acquired by adverse possession, it is necessary to show that the title to such real estate has passed out of the state actually or presumptively. *Kolb v. Jones*, 62 S. C. 193 (40 S. E. Rep. 168). Evidence of admissions by an occupant tending to show that the possession was not adverse, but which were not made until after sufficient time had elapsed to vest the title in him by adverse possession, is properly excluded. *Baty v. Elrod*, Neb. (92 N. W. Rep. 1032). A son living with his father on land to which the latter held the legal title can not introduce evidence of his declarations to third persons in support of a claim of title by adverse possession, where his possession is clearly shown to have been permissive at its inception, and there is no evidence that the father had any knowledge that the son had disavowed the servient and permissive character of his occupation. *Butler v. Butler*, 133 Ala. 377 (32 So. Rep. 579). When a party, to prove title by adverse possession, introduces evidence of occupation by one whom he had placed in possession as a purchaser under oral contract, and who had in fact paid for the land, but was deceased before obtaining a deed, the declarations of such deceased occupant, made on or near the land, during his occupation, to the effect that such occupation was not

adverse to the owner by record, are admissible evidence upon the issue whether the possession was adverse. *Walsh v. Wheelwright*, 96 Me. 174 (52 Atl. Rep. 649). The fact that fences, the erection of which is shown to sustain a claim of title by adverse possession to land across which they are erected, were built, "as a matter of convenience," does not show that the erection was under leave and license of the owner. *Fleming v. Kemp*, 170 Mo. 235 (70 S. W. Rep. 694).

Sec. 22. Proof of adverse possession—Effect of showing adverse claimant's acceptance of a lease from the record owner. The fact that one claiming title to land by adverse possession is shown to have accepted a lease of the premises from the owner of the record title during the time of his holding and at a time when he was called upon to act for the purpose of settling the rights of the disputants to the land, is a strong circumstance to show that his possession was at all times permissive and in subordination to the true title. *McClenahan v. Stevenson*, 118 Ia. 106 (91 N. W. Rep. 925). The court say: "When one in possession of land with full knowledge of all the facts deliberately enters into a written contract by the terms of which he acquires a leasehold interest therein, he does an act which so explains his previous possession as to rebut any subsequent claim that it was adverse. *Church v. Burghardt*, 8 Pick. 327. This rule obtains beyond all question if the lease is made before the full period of the statute of limitations has run. If made after the statutory period has elapsed, and the title of the true owner is barred, there is a conflict in the authorities as to its conclusive effect. *Vickery v. Benson*, 26 Ga. 589, and the *Church v. Burghardt*, 8 Pick. 327, on the one side, and *School Dist. v. Benson*, 31 Me. 381 (52 Am. Dec. 618), and *Bradford v. Guthrie*, 4 Brewst. 351, on the other."

Sec. 23. Color of title—What constitutes. A deed of writing which purports to convey described land, and pass title, gives color of title, no matter in what its invalidity may consist. *Robinson v. Lowe*, 50 W. Va. 75 (40 S. E. Rep. 454). To constitute color of title the instrument need not be sufficient to convey a valid title, or the description be definite in itself, provided it can be made certain by extrinsic evidence. *Sharp v. Shenandoah Furnace Co.*, 100 Va. 27 (40 S. E. Rep. 103). A conveyance executed by a grantor to a grantee

which describes the land intended to be conveyed, and in apt words purports to convey it, though in reality no actual title is passed, gives color of title, based upon a paper title, to the lands described. *Schlageter v. Gude*, 30 Colo. 310 (70 Pac. Rep. 428).

Sec. 24. Extent of possession. Possession under color of title only extends to the boundary lines named in the instrument claimed as color of title, and they cannot be enlarged so as to extend the color of title by showing what was intended to be conveyed. *Johnston v. Case*, 131 N. C. 491 (42 S. E. Rep. 957). In Missouri it is expressly provided by statute (Rev. Stat. 1899, § 4266) that possession under color of title of a part of a tract of land, in the name of the whole tract claimed, and exercising during the time of such possession the usual acts of ownership over the whole tract so claimed, is deemed possession of the whole tract, *First Nat. Bank v. Fry*, 168 Mo. 492 (68 S. W. Rep. 348); but this statute does not apply where the adverse claimant has not been in possession of any part of the tract for the prescriptive period, *Brown v. Hartford*, 173 Mo. 183 (73 S. W. Rep. 140). Actual possession of a part of a tract under color of title extending to the whole is sufficient possession as the whole to ripen into title by the lapse of time; and possession may be had by and through a tenant. *Barrett v. Kelly*, 131 Ala. 378 (30 So. Rep. 824). In the case of *Sharp v. Shenandoah Furnace Co.*, 100 Va. 27 (40 S. E. Rep. 103), the supreme court of Virginia say: "Constructive possession is dependent upon the actual possession, and must continue or fail with it. Consequently, if the occupying claimant conveys that part of the tract which constituted his actual possession, but not the whole tract, he loses his constructive possession of the balance, unless he takes actual possession of some part thereof. 1 Am. & Eng. Enc. Law (2d Ed.) 865, 866; 1 Cyc. Law & Proc. 1129; *Trotter v. Cassady*, 3 A. K. Marsh. 365 (13 Am. Dec. 183); *Cunningham v. Robertson's Lessee*, 1 Swan, 138; *Chandler v. Rushing*, 38 Tex. 591; *West v. McKinney*, 92 Ky. 638 (18 S. W. Rep. 633)."

Sec. 25. Rule as to constructive possession does not apply against a record owner none of whose lands are in actual adverse possession of the claimant. The rule that actual adverse occupation of a part of a tract of land under a

recorded deed is a constructive adverse occupation of the whole tract covered by the deed does not apply to a record owner none of whose land is thus occupied. Unless some part of his own land is adversely occupied the record owner is not affected by the fact that his land is included, with other land, in a deed between strangers, followed by an adverse occupation of some part of the other land not his. *Walsh v. Wheelwright*, 96 Me. 174 (52 Atl. Rep. 649). The court say: "The principle of the rule invoked by the defendant is that when an owner of a parcel of land sees, or could see, any part of it in the adverse occupation of another person, he should assume such occupation to be under some claim of right, and, if that occupation be under a recorded deed to the occupant, the owner is bound to take notice that the claim of right extends over the whole parcel, and that the occupation of part will affect the whole. When, however, the owner finds that no part of his land is being adversely occupied, he has no occasion to assume or investigate anything. Recorded conveyances between other persons, even of his land, if not followed by an actual adverse occupation of some part of his land, do not affect him. He is not required to take any notice of such conveyances. He is not required to take any notice from the occupation of adjoining lands that his land is claimed. His title to his own land is not affected by the most complete occupation of the adjoining lands. It is only when some part of his land is being adversely occupied that he is put upon inquiry or is affected with notice of recorded conveyances between other persons. *Busw. Adv. Poss.* § 256; *Bailey v. Carleton*, 12 N. H. 9 (37 Am. Dec. 190); *Turner v. Stephenson*, 72 Mich. 409 (40 N. W. Rep. 735; 2 L. R. A. 277); *Kile v. Tubbs*, 23 Cal. 431; *Hole v. Rittenhouse*, 25 Pa. 491; *Adams v. Clapp*, 87 Me. 316 (32 Atl. Rep. 911)."

Sec. 26. Title by—Character of title acquired and who may acquire. Title by prescription will support an action to quiet title, *Harris v. Duarte* Cal. (70 Pac. Rep. 298); or ejectment, *Stevens v. Martin*, 168 Mo. 407 (68 S. W. Rep. 347). One acquiring title to land by adverse possession, under Tex. Rev. Stat., art. 3347, gets "full title," that is, all the title which has emanated from the state vests in the possessor as against the claim of any and all persons. *Burton's Heirs v. Carroll*, 96 Tex. 320 (72 S. W. Rep. 581). A railroad company may acquire an easement in a right of way by

adverse possession, although a constitutional provision (Mo. Const., art. 2, § 21) provides "that private property shall not be taken or damaged for public use without just compensation." *Boyse v. Missouri Pac. R. Co.*, 168 Mo. 583 (68 S. W. Rep. 920; 58 L. R. A. 442).

Sec. 27. Title by—Payment of taxes—Statutes construed. The fact that one purchasing a tax title from the holder thereof was at the time of the tax sale entitled, as an heir, to an undivided share in the land, does not render his title insufficient as color of title to give him title by seven years holding thereunder, under Hurd's Ill. Rev. Stat. 1899, p. 147, providing that possession of land under claim and color of title, in good faith, for seven years, during which taxes are paid, gives the holder good title. *Richards v. Carter*, 201 Ill. 165 (66 N. E. Rep. 343). A wife to whom her husband conveys land of which he is in joint possession with his mother who is entitled to dower therein, does not acquire title to such land, under Ill. Rev. Stat., ch. 83, § 6, as against such dower interest, by a continuance of such possession for seven years and the payment of taxes. *Brumback v. Brumback*, 198 Ill. 66 (64 N. E. Rep. 741). To create title to vacant land, under Hurd's Ill. Rev. Stat., ch. 83, § 7, in one claiming it under color of title and payment of taxes for seven successive years, such payment of taxes must be united with actual possession of the holder of such title, and where such possession is wanting an entry made on the land by him after the holders of the paramount title have taken possession of the land by inclosing it with a fence, does not give him any rights. *Stalford v. Goldring*, 197 Ill. 156 (64 N. E. Rep. 395). For one to blaze out the boundary lines of part of a large tract of thickly wooded swamp lands, cut an inconsiderable amount of timber, and at various times to warn persons seeking to trespass thereon to keep off, does not constitute possession necessary for title under this statute. *Travers v. McElvain*, 200 Ill. 377 (65 N. E. Rep. 623). To give one title under N. Dak. Rev. Codes 1899, § 3491a, which provides that all titles to real property of persons who have been or hereafter may be in the adverse possession thereof for ten years, and shall have paid all taxes legally assessed thereon, shall be valid, he himself must have held the adverse possession and paid the taxes for the full ten years; he cannot avail himself of the possession or payment

of taxes of his grantor. *J. B. Streeter Jr. Co. v. Fredrickson*, 11 N. Dak. 300 (91 N. W. Rep. 692).

Sec. 28. Interruption of adverse holdings—Tacking of adverse holdings. The actual adverse holding by a lot owner of a part of an adjoining lot by his planting thereon fruit trees and inclosing it with his lot is not suspended by his obtaining license to use the other part of the lot from one claiming the ownership of the whole. *O'Flaherty v. Mann*, 196 Ill. 304 (63 N. E. Rep. 727). In order for one to claim the benefit of the adverse possession of another by tacking, his chain of title must connect him with that of such third person. *Murray v. Pannaci*, 64 N. J. Eq. 147 (53 Atl. Rep. 595); *Johnston v. Case*, 131 N. C. 491 (42 S. E. Rep. 957). The possession of an heir may be tacked to that of his ancestor where it is simply a continuation of the latter's possession and there is no new entry. *Epperson v. Stansill*, 64 S. C. 485 (42 S. E. Rep. 426). For particular case in which priority of possession between adverse holders was held to be such as to authorize tacking, see *West v. Edwards*, 41 Or. 609 (69 Pac. Rep. 992). In order that a person occupying premises adversely may tack his possession to that of persons under whom he claims, for the purpose of establishing the statutory bar, the particular premises claimed must have been embraced in the deed or transfer to him, whatever the form thereof may have been. *Evans v. Welch*, 29 Colo. 355 (68 Pac. Rep. 776). A railroad company with the power of eminent domain may purchase the incipient title of one holding land adversely which becomes a valid title when the combined holding of the company and its grantor equals the prescriptive period. *Covert v. Pittsburg & W. Ry. Co.*, 204 Pa. St. 341 (54 Atl. Rep. 170). One seeking to establish title by adverse possession, under N. Dak. Rev. Codes 1899, § 3491a, which provides that all titles to real property of persons who have been or hereafter may be in the adverse possession thereof for ten years, and shall have paid all taxes legally assessed thereon, shall be valid, can not avail himself of the doctrine of tacking adverse possessions. *J. B. Streeter Jr. Co. v. Fredrickson*, 11 N. Dak. 300 (91 N. W. Rep. 692).

Sec. 29. Railroad right of way. In Washington it is held that a railroad company to whom a right of way is granted by the government may lose title to a part thereof by

its being held adversely by a subsequent homestead applicant, for the period prescribed by the statute of limitations (2 Bal. Ann. Wash. Codes & Stat., § 4797) to bar an action to recover real estate; § 4807 of the statute providing that "the limitations prescribed in this chapter shall apply to actions brought in the name of the state, or any county or other public corporation therein, or for its benefit, in the same manner as to actions by private parties." *Northern Pac. Ry. Co. v. Hasse*, 28 Wash. 353 (68 Pac. Rep. 882; 92 Am. St. Rep. 840). Applying *Mo. Rev. Stat. 1899, § 4270*, providing that the statute of limitations shall not extend to any lands given, granted, or appropriated to any public use, it is held that title to lands conveyed to a railroad company for a right of way, stock yards and grounds, cannot be acquired by adverse possession, although the land was not occupied for railroad purposes during the adverse occupancy. *St. Joseph, St. L. & S. F. Ry. Co. v. Smith*, 170 Mo. 327 (70 S. W. Rep. 700). The court follows the case of *Omaha & St. L. Ry. Co. v. Wabash, St. L. & P. Ry. Co.*, 108 Mo. 298 (18 S. W. Rep. 1101), and says: "The research of counsel for appellant developed the fact that the conclusion so reached by this court in that case is in perfect consonance with similar cases in other jurisdictions. *Slocumb v. Railroad Co.*, 57 Ia. 675 (11 N. W. Rep. 641); *Railroad Co. v. French*, 100 Tenn. 209 (43 S. W. Rep. 771; 66 Am. St. Rep. 752); *Railway Co. v. Telford's Ex'rs.* 89 Tenn. 293 (14 S. W. Rep. 776; 10 L. R. A. 855); *Fox v Hart*, 11 Ohio, 414. The fact is emphasized in these cases that the railroad is not cut off from its right to claim that such land is appropriated to a public use, because it had not previous to the controversy actually used it for a right of way, depot grounds, etc.; for it was pointed out that, if the land was within the designation, the company was not obliged to actually occupy it until it became necessary or desirable for it to do so, and that any one who enters upon land so owned by a railroad company and erects improvements thereon does so at his peril, and is affected with notice of the rights of the railroad to such land, and that no possession can be adverse to the railroad, or be made the basis of a title by limitation as against the railroad, no matter how long that possession may continue."

Sec. 30. Public property. As between individuals, possession of land acquired from the federal government may become adverse from the moment the entryman is en-

titled to his patent. *Baty v. Elrod*, Neb. (92 N. W. Rep. 1032). There can be no adverse possession against a municipality as to property held by it for the public. *Mobile Transp. Co. v. City of Mobile*, 128 Ala. 335 (30 So. Rep. 645; 86 Am. St. Rep. 143); *Shirk v. City of Chicago*, 195 Ill. 298 (63 N. E. Rep. 193); *Russell v. City of Lincoln*, 200 Ill. 511 (65 N. E. Rep. 1088); *McClellan v. Town of Weston*, 49 W. Va. 669 (39 S. E. Rep. 670; 55 L. R. A. 808), Citing numerous authorities. Prior to Minn. Laws 1899, ch. 65, changing the rule, the public easement in and to streets and highways could be extinguished in that state by fifteen years adverse possession. *City of Hastings v. Gillitt*, 85 Minn. 331 (88 N. W. Rep. 987). Applying the general rule that title to land held by a municipality for public use cannot be acquired by adverse possession, it is held that where a certain strip of land is conveyed to a municipal corporation for use as a public street, and the authorities accept the deed, but open and use but one half, longitudinally, of the land, adverse possession of the remainder by a private individual cannot ripen into a prescriptive title, although such possession is under a deed from the dedicator subsequent to the deed to the municipality. *Norrell v. Augusta Ry. & Electric Co.*, 116 Ga. 313 (42 S. E. Rep. 466; 59 L. R. A. 101).

Sec. 31. Adverse possession as between parties in privity. A conveyance by a life tenant to a third person, by words that purport to convey the fee, will not make the possession of the purchaser adverse to the remaindermen during the continuance of the life estate. *Peterson v. Jackson*, 196 Ill. 40 (63 N. E. Rep. 643). A mortgagor continuing in possession after the foreclosure of a mortgage and sale of the premises, under a power contained in it, holds adversely to the mortgagee purchasing at such sale, from the date thereof. *Garren v. Fields*, 131 Ala. 304 (30 So. Rep. 775). Where the relationship of father and son exists between the parties, the possession of the land of the one by the other is presumed to be permissive, and not adverse. To make such possession adverse, there must be some assertion of open hostile title other than mere possession, and knowledge thereof must be brought home to the one who owns the land. This doctrine is not affected by the fact that the occupant has paid all taxes for a number of

years, has made valuable improvements, and apparently is exercising complete dominion over the property. *Collins v. Colleran*, 86 Minn. 199 (90 N. W. Rep. 364). If the husband in his lifetime has conveyed the land by a deed, in which his wife did not join, and she, after the first husband's death marries the grantee, who lives with her upon the premises, the possession is the possession of the wife until her dower is assigned, and not the possession of the husband. Such possession by the grantee can not be set up, by those claiming under him, as a possession which will draw to it the possession of an adjoining tract, left in the possession of the widow of the first husband (and over which her right of dower extends), in order to support a title to such adjoining tract by adverse possession. *Reed v. Hackney*, N. J. Eq. (54 Atl. Rep. 229).

Sec. 32. Vendor and vendee—Possession of grantor after conveyance. The possession of one who occupies premises under an executory contract of purchase is not adverse to the vendor so long as the purchase money is not paid, or until by the terms of the agreement the vendee is entitled to demand a conveyance of the legal title. *Beer v. Dalton*, (Neb.) 92 N. W. Rep. 593. Citing, *Farish v. Coon*, 40 Cal. 54; *Kerns v. Dean*, 77 Cal. 555 (19 Pac. Rep. 817); *Timmons v. Kidwell*, 138 Ill. 13 (27 N. E. Rep. 756); *Woods v. Dille*, 11 Ohio, 455; *Anderson v. McCormick*, 18 Or. 301 (22 Pac. Rep. 1062); *Furlong v. Garrett*, 44 Wis. 122; *Lovell v. Frost*, 44 Cal. 474. Where a grantor remains in possession after a valid conveyance, his possession is presumed to be permissive and subordinate to the grantee, but this presumption does not extend to possession by a grantor's subsequent entry upon the possession of his grantee, and he may acquire title by sufficient adverse holding under such subsequent entry. *Horbach v. Boyd*, 64 Neb. 129 (89 N. W. Rep. 644). The general rule that the continued possession of a grantor and his heirs, after his conveyance, is presumed to be subservient to his grantee, applies although his conveyance was made to defraud creditors. *Collins v. Colleran*, 86 Minn. 199 (90 N. W. Rep. 364); *McClenahan v. Stevenson*, 118 Ia. 106 (91 N. W. Rep. 925). In the last case the court say: "If it be conceded that the conveyance was in fraud of creditors, it was good as between the parties thereto and all persons in

privity with them. In such cases a grantor in possession is presumed, in the absence of a contrary showing, to be holding in subordination to the title of his grantee. *McNeil v. Jordon*, 28 Kan. 7. Of course, such a grantor may acquire title by adverse possession, even as against his warranty deed; but he must explicitly disclaim holding under his grantee, and openly assert his title in hostility to the title claimed under his own previous deed. *Knight v. Knight*, 178 Ill. 553 (53 N. E. Rep. 306); *Stearns v. Hendersass*, 9 Cush. 497 (57 Am. Dec. 65). But the mere fact that the grantor and his heirs remain in possession, enjoying the property in the same manner as they did before the conveyance was made, does not bind the grantee with notice of an adverse claim. *Hennessey v. Andrews*, 6 Cush. 170; *Van Keuren v. Railroad Co.*, 38 N. J. L. 165; *Paldi v. Paldi*, 84 Mich. 346 (47 N. W. Rep. 511); *Ivey v. Beddingfield*, 107 Ala. 616 (18 So. Rep. 139); *Evans v. Templeton*, 69 Tex. 375 (6 S. W. Rep. 843; 5 Am. St. Rep. 71). Of course, if the grantor and his heirs remain in possession for the statutory period, openly claiming the land as their own, and this claim is made known to the grantee, either expressly or by implication, title may be acquired through such possession. *Meeks v. Garner*, 93 Ala. 17 (8 So. Rep. 378; 11 L. R. A. 196); *Knight v. Knight*, 178 Ill. 553 (53 N. E. Rep. 306). But he must openly claim the land as his own, and not under or by the permission of his grantee. The presumption, as elsewhere stated, always is that a grantor who remains in possession holds without claim of right, and by sufferance of his grantee."

Sec. 33. Landlord and tenant. An adverse holding by a tenant against his landlord begins from the time the landlord has notice of the tenant's adverse claim. *Greenwood v. Moore*, 79 Miss. 201 (30 So. Rep. 609). To render a tenant's possession adverse to his landlord, it is not necessary that he first surrender the possession, but there must be a clear, positive, and continued disclaimer and disavowal of the landlord's title, and knowledge of the fact that the possession is adverse must be brought home to the landlord. *Neff v. Ryman*, 100 Va. 521 (42 S. E. Rep. 314).

Sec. 34. Tenants in common—Grantee of one cotenant. In the absence of proof of a contrary intention, one

tenant in common taking possession of the common estate is presumed to hold possession for his cotenants as well as for himself. *Stevens v. Martin*, 168 Mo. 407 (68 S. W. Rep. 347). His possession does not become adverse until there is an intention on his part to oust them, of which they have notice. *Bentley v. Callaghan*, 79 Miss. 302 (30 So. Rep. 709). An entry by a grantee in a deed by one cotenant purporting to convey the entire fee, made after recording the deed, amounts to an ouster of the other cotenants, and possession continued thereunder for the prescriptive period gives title. *Sudduth v. Sumeral*, 61 S. C. 276 (39 S. E. Rep. 534; 85 Am. St. Rep. 883). But such possession for less than the prescriptive period is not sufficient to raise the presumption of ouster. *Hardee v. Weathington*, 130 N. C. 91 (40 S. E. Rep. 855).

Sec. 35. Conveyance of land in adverse possession of another. The doctrine of champerty, which inhibits and makes void a sale of land in possession of a third person under a claim of right, has no application to judicial sales. *Griffin v. Dauphin*, 133 Ala. 543 (31 So. Rep. 849). Applying Conn. Gen. Stat., § 2966, making void any conveyance of land by a grantor of which he is ousted by the possession of another, unless made to the person in possession, it is held that the grantee in a deed of land which is in the possession of a mortgagee acquires no title, and can not maintain an action to determine the rights of such mortgagee. *Mead v. Fitzpatrick*, 74 Conn. 521 (51 Atl. Rep. 515). A deed which is made to carry out a previous contract is never champertous as to one who enters after the contract was made. *Percifull v. Coleman*, (Ky.) 72 S. W. Rep. 29 (24 Ky. Law Rep. 1685). Construing and applying Shannon's Tenn. Code, §§ 3171, 3172, prohibiting the sale of pretended titles to lands, and declaring champertous and void the sale of land where the seller has not by himself, agent tenant, or ancestor, been in actual possession, or taken the rents and profits, for one whole year next before the sale, it is held that a sale of lands held under a perfect title, but in the adverse possession of another at the time, is a sale of a pretended title, within the meaning of the statute, regardless of the length of such adverse possession; that a conveyance of lands adversely held is a nullity, and may be so treated by both parties and strang-

ers; and this rule applies where the conveyance is of an entire tract, part of which the adverse claimant held in actual adverse possession, and of the remainder of which he was in constructive possession under assurance of title. *Green v. Cumberland Coal & Coke Co.*, Tenn. (72 S. W. Rep. 459).

ALIENS.

EPITOME OF CASES.

Sec. 36. Common law rights of aliens as to real estate.

In the case of *Donaldson v. State*, Ind. (67 N. E. Rep. 1029), the supreme court of Indiana exhaustively considers and construes the several statutory provisions of that state (Laws 1861, p. 153, Burns' Stat., § 3328; Laws 1881, p. 84, Burns' Stat. § 3389; Laws 1885, p. 79) concerning the right of aliens to take and transmit property. In speaking of the common law on this subject, the court say: "At common law an alien could take real estate by deed or other act of purchase and hold the same against all except the state, and against it until it instituted a proceeding and obtained a judgment by inquest of office or office found, or an act equivalent thereto. Before office found, or its equivalent, he could convey the same and confer title upon the purchaser. Blackstone's Commentaries, book 1, p. 372; *Id.*, book 2, pp. 274, 293; Greenleaf's Cruise, Real Prop. *p. 320; 1 Bacon's Abridg. pp. 201-208, tit. 'c'; 1 Coke, Litt. 2a, b; 2 Kent's Comm. *p. 61; 1 Jones on Law of Real Property and Conveyancing, §§ 163, 166; 2 Amer. & Eng. Ency. of Law (2d. Ed.) pp. 70-72, and cases cited; 2 Cyc. of Law & Proc. pp. 90-96, and cases cited; 1 Washburn on Real Prop. *p. 48, § 22; 1 Washburn on Real Prop. (6th Ed.) § 131; *Fox v. Southack*, 12 Mass. 143; *Fairfax v. Hunter*, 7 Cranch, 602, 619 (3 L. Ed. 453); *Orr v. Hodgson*, 4 Wheat. 453, 462 (4 L. Ed. 613); *Halstead v. Board, etc.*, 56 Ind. 363, 377; *Wunderle v. Wunderle*, 144 Ill. 40, 66 (33 N. E. Rep. 195; 19 L. R. A. 84, 88, 89); *Oregon, etc., Co. v. Carstens*, 16 Wash. 165 (47 Pac. Rep. 421; 35 L. R. A.

841, 843, and cases cited). But he could neither take nor transmit title to real property by descent. He had no inheritable blood. 1 Comyn's Digest, 'Alien' (c); Blackstone's Commentaries, book 1, p. 372; Id., book 2, pp. 249, 274, 293; 2 Am. & Eng. Enc. Law. (2d Ed.) pp. 73, 74; 2 Cyc. of Law & Proc. pp. 94-96; 1 Washburn on Real Property, p. 49, § 23; Id. (6th Ed.) § 131. 1 Jones, Law of Real Property and Conveyancing, § 166; Eldon v. Doe, 6 Blackf. 341; Doe v. Lazenby, 1 Ind. 234; Murray v. Kelly, 27 Ind. 43, 46; Orr v. Hodgson, 4 Wheat. 453 (4 L. Ed. 613); Mooers v. White, 6 Johns. Ch. 361, 365; Colgan v. McKeon, 24 N. J. L. 566. If, however, an alien died without having made a conveyance of land acquired by deed or devise, the same vested immediately by escheat in the state, without any inquest of office found. 2 Am. & Eng. Enc. Law (2d Ed.) p. 74; 2 Cyc. of Law & Proc. pp. 94-96; Jones on Law of Real Property and Conveyancing, § 166; 4 Kent's Comm. *p. 423; Coke, Litt. 2b; Comyn's Digest, 'Alien,' C. 2, C. 4; Crane v. Reeder, 21 Mich. 24, 80 (4 Am. Rep. 430, 447, 448); Montgomery v. Dorion, 7 N. H. 475; Sands v. Lynham, 27 Grat. 291 (21 Am. Rep. 348, 351); Mooers v. White, 6 Johns. Ch. 360, 366; Wilbur v. Tobey, 16 Pick. 177, 180; Wunderle v. Wunderle, 144 Ill. 40, 66 (33 N. E. Rep. 195; 19 L. R. A. 84, 88, 89); American Mortg. Co. v. Tennile, 87 Ga. 28 (13 S. E. Rep. 158; 12 L. R. A. 531, note). It follows that, under the common law, citizens may 'pass by descent' to, or 'take by descent' from citizens. Aliens can do neither without statutory authority. 2 Cyc. of Law & Proc. pp. 94-96. The citizen having, and the alien not having, inheritable blood, to enable the citizen to transmit land by descent to an alien, it is only necessary to confer upon the alien by statute the power to take by descent, and to enable the alien to transmit lands by descent to the citizen, that power need only be conferred by statute upon the alien. Colgan v. McKeon, 24 N. J. L. 566, 572-574; Spratt v. Spratt, 1 Pet. (U. S.) 343, 349 (7 L. Ed. 171); Spratt v. Spratt, 4 Pet. (U. S.) 392, 407, 408 (7 L. Ed. 897). Where, however, both the ancestor and descendant are aliens, there is a want of capacity in each. In such case the statute must confer upon the alien ancestor the power to transmit by descent, and the alien descendant the power to take by descent, before such descendant can

take from such ancestor real estate by descent. *Eldon v. Doe*, 6 Blackf. 341, 343, 344. When, therefore, the legislature confers upon aliens the power to take by descent, without granting to aliens the power to transmit by descent, such aliens can only take by descent from ancestors who have the capacity to transmit by descent, namely, citizens."

ASSIGNMENTS AND BANKRUPTCY.

EPITOME OF CASES.

Sec. 37. Miscellaneous notes. An assignment under the Maine insolvency law (Rev. Stat., ch. 70, § 33) does not require a seal. *Milliken v. Houghton*, 97 Me. 447 (54 Atl. Rep. 1075). A stipulation in a deed made to trustees for the benefit of creditors that the trust shall be closed within two years from the date of the deed is merely directory, and a sale made within the two years is not invalidated by the fact that the price was not paid or the deeds executed until after the time had expired. *Shirk v. Trundle*, 96 Md. 177 (53 Atl. Rep. 928). The assent of non-resident creditors to a common law assignment will not be presumed so as to defeat an attachment by them of property of a debtor in their state, where the assignment contained conditions which might be prejudicial to their interests. *Weston v. Nevers*, N. H. (54 Atl. Rep. 703). In the absence of a statute giving the right, an assignee under a voluntary assignment for creditors takes no right of action, as against previous grantees and mortgagees, except such as the assignor himself would have had. *Crocker v. Huntzicker*, 113 Wis. 181 (88 N. W. Rep. 232). A contingent remainder passes under a deed of assignment which, after specifically naming certain property, contained the words "also all other real and personal estate, of every description," under Ky. Stat., §§ 75, 2341. *McAllister v. Ohio Val. Baking & Trust Co.*, Ky. (71 S. W. Rep. 509; 24 Ky. Law Rep. 1307). When one making an assignment

has in his possession a deed previously executed by him, but not delivered, which he files for record on the same day the assignment is recorded, it will be treated as a part of the assignment and held invalid as a preference to creditors. *Taylor v. Seiter*, 199 Ill. 555 (65 N. E. Rep. 433). Particular evidence held not to justify the vacation of a sale of land by trustees for the benefit of creditors on the ground that the price paid was grossly inadequate. *Shirk v. Trundle*, 96 Md. 177 (53 Atl. Rep. 928). For exhaustive collation of authorities on "Liability for rent of premises occupied by receiver or assignee for creditors," see 59 L. R. A. 673-698.

Sec. 38. Federal bankruptcy—Discharge—Power of trustee—Conveyances and liens. The fact that the principal debtors in a suit to enforce a mechanic's lien have been discharged of the debt by proceedings in bankruptcy under the federal act of 1898, pending such suit, does not defeat the lien. *Holland v. Cunliff*, 96 Mo. App. 67 (69 S. W. Rep. 737). The discharge of a bankrupt is only personal to himself, and does not affect any lien, either by contract or by judicial proceedings, against property, *Paxton v. Scott*, Neb. (92 N. W. Rep. 611); *Evans v. Rounsaville*, 115 Ga. 684 (42 S. E. Rep. 100); *Reed v. Equitable Trust Co.*, 115 Ga. 780 (42 S. E. Rep. 102); nor does it destroy a creditor's right to collect his debt by enforcing a trust in land held by a third person, arising in favor of the discharged bankrupt, on account of his furnishing part of the purchase price, *Evans v. Staalle*, 88 Minn. 253 (92 N. W. Rep. 951). An action to set aside a fraudulent conveyance of a bankrupt may be maintained by a trustee appointed in the bankruptcy proceedings, at any time within two years after the estate has been closed, provided the action was not barred at the time the petition in bankruptcy was filed. *Schreck v. Hanlon*, Neb. (92 N. W. Rep. 625); *Sheldon v. Parker*, Neb. (92 N. W. Rep. 923). In such an action, the trustee is presumed to represent the creditors of the bankrupt, and the burden is upon those who deny his authority to prove the contrary. *Oliver v. Hilgers*, 88 Minn. 35 (92 N. W. Rep. 511). As to right of trustee to maintain such a suit in the state court, and the character of the action, see *Andrews v. Mather*, 134 Ala. 358 (32 So. Rep. 738). A trustee of a bankrupt,

who, with knowledge that the validity of a mortgage on his bankrupt's real estate is questioned, as an unlawful preference, sells such real estate on the basis of its value over and above the mortgage, will be held to have elected to treat the mortgage as valid, and he thereby waives his right to set it aside. *O'Niel v. International Trust Co.*, 183 Mass. 32 (66 N. E. Rep. 424). In New Jersey it is held that a conveyance by a bankrupt within four months, to a bona fide creditor for a precedent debt, by way of preference, is not invalid, under § 67, par. e, of the Federal Bankruptcy statute (U. S. Comp. Stat. 1901, p. 3449). *Congleton v. Schreihofer*, N. J. Eq. (54 Atl. Rep. 144). The bankruptcy act of 1898, § 67f (U. S. Comp. Stat. 1901, p. 3450), declaring void liens obtained within four months of bankruptcy, does not affect the validity of such liens as against the bankrupt himself. *Rochester Lumber Co. v. Locke*, N. H. (54 Atl. Rep. 705). A mere exchange of securities within four months is not a violation of § 67d of the bankruptcy law; hence a new mortgage part of the consideration for which is cash and the balance applied to the payment of debts secured by old mortgages on the same property is valid. Under § 60b a mortgage executed more than four months before filing the petition in bankruptcy, but not recorded until within four months of that time, is not voidable. *Asbury Park Bldg & L. Ass'n v. Shepherd*, N. J. Eq. (50 Atl. Rep. 65). The principle stated in the second proposition above was held likewise to apply to a deed *Dean v. Plane*, 195 Ill. 495 (63 N. E. Rep. 274). As to how far state statutes concerning assignments and insolvency proceedings are rendered inoperative by the federal bankruptcy statute, see *Old Town Bank v. McCormick*, 96 Md. 341 (53 Atl. Rep. 934; 94 Am. St. Rep. 577); *Hood v. Blair State Bank*, (Neb.) 91 N. W. Rep. 701.

BONA FIDE PURCHASERS.

EPITOME OF CASES.

Sec. 39. As to what constitutes a bona fide purchaser—General principles and particular cases. The protection accorded to purchasers for valuable consideration extends only to cases where they have purchased the legal title; hence does not extend to the holder of an option. *National Oil & Pipe Line Co. v. Teel*, 95 Tex. 586 (68 S. W. Rep. 979). A mortgage taken for a precedent debt on property on which alterations are being made, without notice thereof, is bona fide. *Reed v. Rochford*, 62 N. J. Eq. 186 (50 Atl. Rep. 70.) Bona fide purchasers from a fraudulent grantor are protected by the statute of 13 Eliz., ch. 5, and it is a settled rule that the protection extends to a purchaser from a fraudulent grantee. *Boyer v. Weimer*, 204 Pa. St. 295 (54 Atl. Rep. 21). In Mississippi it is held that a wife taking a conveyance of land from her husband is charged with notice of his fraud in procuring title. *Hamblet v. Harrison*, 80 Miss. 118 (31 So. Rep. 580). A bona fide purchaser at sheriff's sale, who has paid the purchase money without notice of an equity, will be protected against the same. *Johnson v. Equitable Securities Co.*, 114 Ga. 604 (40 S. E. Rep. 787; 56 L. R. A. 933). A surety on a note secured by a vendor's lien of the land of the principal who purchases the same at a foreclosure sale under the lien, paying the amount of his bid and also the balance of the judgment, is a purchaser for value. *Sullivan v. McLane*, 96 Tex. 144 (70 S. W. Rep. 949). In Michigan a grantee in a quitclaim deed is not a bona fide purchaser and has no priority over a prior grantee of his grantor holding under an unrecorded deed. *Messenger v. Peter*, 129 Mich. 93 (88 N. W. Rep. 209). In Georgia it is held that in order to sustain a voluntary conveyance against a subsequent bona fide purchaser for a valuable consideration, notice to the purchaser of the prior volu i-

tary deed must be actual, and that such a purchaser who has no actual notice is protected, notwithstanding the prior voluntary conveyance has been duly recorded. *Finch v. Woods*, 113 Ga. 996 (39 S. E. Rep. 418). Purchasers of land from the heirs of a deceased surety on a duly recorded guardian's bond take subject to the contingency of the real estate being required to liquidate his liability on the bond. *Savings Bldg & Loan Ass'n v. Tart*, 81 Miss. 276 (32 So. Rep. 115). The fact that one to whom property is conveyed as a mere conduit in order to change the title has no notice of outstanding equities, does not take away the effect upon his grantor and grantee of their notice of such equities. *Greenwood Bldg. & L. Ass'n v. Stanton*, 28 Ind. App. 548 (63 N. E. Rep. 574). A bona fide grantee of real estate, without notice, on which is situated a building used as a residence, and apparently a part of the freehold, will take title to the land, including such building, divested of a claim of ownership by a third party whose rights are based on an alleged purchase of such building from such grantor as chattel property. *Moore v. Moran*, 64 Neb. 84 (89 N. W. Rep. 629). One purchasing land upon which there is a duly recorded mortgage of which he had no actual knowledge can not claim the rights of a bona fide purchaser as against it on account of his reliance upon his grantor's statement that the land was unincumbered, nor can he claim compensation for buildings subsequently erected upon the land, on foreclosure of the mortgage. *Beach v. Osborne*, 74 Conn. 405 (50 Atl. Rep. 1019). See opinion for discussion of this subject. Where a person purchases real estate with knowledge of a third party's equitable lien thereon, or with notice of such facts as would put an ordinarily prudent man on inquiry, which, if pursued, would lead to such knowledge, such person cannot be said to be a good faith purchaser without notice, and entitled to protection as such. *Frerking v. Thomas*, 64 Neb. 193 (89 N. W. Rep. 1005).

BOUNDARIES.

EPITOME OF CASES.

Sec. 40. Agreements fixing. A parol agreement between the owners of adjacent tracts of land settling a disputed boundary, or one that is uncertain or unascertained, when followed by their taking possession accordingly and acquiescing in the boundary so fixed, becomes binding upon them and upon those claiming under them. *Thiessen v. Worthington*, 41 Or. 145 (68 Pac. Rep. 424); *Dierssen v. Nelson*, 138 Cal. 394 (71 Pac. Rep. 456); *Sherman v. King*, Ark. (72 S. W. Rep. 571); *Alexander v. Parks*, (Ky.) 72 S. W. Rep. 1105 (24 Ky. Law Rep. 2113). An oral agreement by a landowner as to a division line is not within the statute of frauds; but a surveyor or his assistant directed by such owner to locate the line cannot bind him by their agreement. *Higginson v. Schaneback*, (Ky.) 66 S. W. Rep. 1040; (23 Ky. Law Rep. 2230).

Sec. 41. Establishing boundaries by acquiescence or adverse possession. Where two persons claim to a certain line, and the only question is where the line runs, neither can be said to claim adversely to the other, and evidence can be adduced to prove the location of the line. *Small v. Hamlet*, (Ky.) 68 S. W. Rep. 395 (24 Ky. Law Rep. 238). The possession of a coterminous owner up to a line erroneously believed to be the true line is not presumably adverse, but may be so if the claimant claims it as the true line, and he holds the property up to it, claiming it as his own. *Barrett v. Kelly*, 131 Ala. 378 (30 So. Rep. 824). See, on this point, *Patton v. Smith*, 171 Mo. 231 (71 S. W. Rep. 187); *Peters v. Reichenbach*, 114 Wis. 209 (90 N. W. Rep. 184). Where a boundary line between two adjoining owners is fixed by their making survey and erecting a fence in accordance therewith, one of them claiming such line as the boundary, repudiating later surveys and any desire

to hold his neighbor's land, holds adversely. *Gist v. Doke*, 42 Or. 225 (70 Pac. Rep. 704). Where a division line, supposed to be the true line established by the government survey, has been acquiesced in by the parties interested for more than the prescriptive period, it is conclusive of the location of the boundary line; but whether such line was agreed upon or has been acquiesced in as the true division line is a question of fact, to be submitted to the jury in a proper case. *Clark v. Thornburg*, Neb. (92 N. W. Rep. 1056). An agreement between adjacent land-owners to have the existing boundary line resurveyed, is not such an admission of its incorrectness as will interrupt a claim of adverse possession by either. *Baty v. Elrod*, Neb. (92 N. W. Rep. 1032).

Sec. 42. Proceedings to establish boundaries—Evidence. Title cannot be tried in processioning proceedings brought under N. C. Laws 1893, ch. 22. *Midgett v. Midgett*, 129 N. C. 21 (39 S. E. Rep. 722). In determining boundary lines between lands, the testimony of a nonexpert, who claims to have located the line from government monuments then in existence, may be accepted by the jury in preference to that of surveyors who have subsequently located a different line independently of such monuments. *Baty v. Elrod*, Neb. (92 N. W. Rep. 1032). In an action involving the location of a boundary line, the draft of certain lines in a plat, and the description of them in a deed, are only evidence of the actual survey. The lines marked on the ground constitute the actual survey, and where those lines are located is a matter of fact, to be determined by the jury from all the evidence. *Ayres v. Huddleston*, 30 Ind. App. 242 (66 N. E. Rep. 60). *Citing, Comegys v. Carley*, 3 Watts, 280 (27 Am. Dec. 356); *Heaton v. Hodges*, 14 Me. 66 (30 Am. Dec. 731, 735, note); *Scott v. Yard*, 46 N. J. Eq. 79 (18 Atl. Rep. 359); *Wooden Ware Co v. Lawson*, 70 Wis. 600 (36 N. W. Rep. 412). *Cross v. Manufacturing Co.*, 121 Pa. 387 (15 Atl. Rep. 643); *Johnson v. Archibald*, 78 Tex. 96 (14 S. W. Rep. 266; 22 Am. St. Rep. 27); *Le Compte v. Lueders*, 90 Mich. 495 (51 N. W. Rep. 542; 30 Am. St. Rep. 450). For cases determining particular questions as to admissibility of evidence, and applicability of instructions, see *Clark v. Gallagher*, 74 Vt. 331 (52 Atl. Rep. 539); *First Nat. Bank v.*

McDonald, 42 Or. 257 (70 Pac. Rep. 901); *Miller v. Cure*, 205 Pa. St. 168 (54 Atl. Rep. 721).

Sec. 43. Jurisdiction of equity to establish boundaries.

A bill by one of two adjoining owners averring that the true location of the boundary line between them is confused and unsettled, and that the defendant has at various times moved the line so as to encroach upon the complainant's lands, is sufficient to give a court of equity jurisdiction to establish the boundary between them. *Guice v. Barr*, 130 Ala. 570 (30 So. Rep. 563). The court say: "The averments of the bill clearly make a case for the interposition of a court of equity. The jurisdiction of chancery to establish disputed boundaries is ancient and well defined. And while it does not arise upon any mere dispute as to the location of the boundary between adjoining parcels of land, or even upon a mere dispute as to such location of a confused or obliterated line, it will be exercised when the confusion or obliteration has resulted from the act of the defendant in fraud of the complainant's rights. *Ashurst v. McKenzie*, 92 Ala. 484 (9 So. Rep. 262); 3 Pom. Eq. Jur. §§ 1384, 1385; 1 Story, Eq. Jur. §§ 619-621; 4 Am. and Eng. Enc. Law (2d Ed.) 839, 840. The gradual encroachment upon the lands of complainant by defendant by moving the fence which marked the line between them, and thus obliterating the boundary, entitled, if proven, the complainant to a commission, and therefore to the exercise of the power of a court of equity. *Bute v. Canal Co.*, 1 Phil. Ch. 681; *Boteler v. Spelman*, Finch, 96; 4 Am. & Eng. Enc. Law (2d Ed.) p. 840, note 2."

Sec. 44. Highways as boundaries. In the absence of evidence to the contrary, where a street is named as a boundary in a deed, it must be taken that the parties intended the boundary to be the street as actually opened up and used. *Southern Iron Works v. Central of Georgia Ry. Co.*, 131 Ala. 649 (31 So. Rep. 723). The presumption that a conveyance of land described as lying alongside a street embraces the land to the center thereof does not arise until there has been some showing that the grantor had title to the center of the street. *Humphreys v. Eastlack*, 63 N. J. Eq. 136 (51 Atl. Rep. 775). A conveyance of premises abutting upon a street, in case of a common-

law dedication, by operation of law carries with it the fee of the land underlying the street to the center of the street, subject to the public easement; and this is true although the conveyance describe the premises conveyed by the lot or block number only, unless the title to the street is expressly reserved to the grantor, or specifically excluded from the grant, and the intent to exclude the street must appear from the language of the deed, as explained by surrounding circumstances. *Brewster v. Cahill*, 199 Ill. 309 (65 N. E. Rep. 233). Where the owner of lots abutting on a street widens it by throwing into the street six feet off his lots and subsequently conveys the lots to several grantees as bounded on the street as enlarged, they do not acquire any special interests in the six feet which prevents one of their number building up to the line of the street afterward fixed by the municipal authorities so as to include only five of the six feet. *Bornot v. Bonshur*, 202 Pa. St. 463 (52 Atl. Rep. 44).

Sec. 45. Streams and waters as boundaries—Meandered lines. Where a stream is intended to be meandered by public surveys, the stream, and not the actual meander line as run on the ground, is the true boundary of the riparian owner. *Johnson v. Tomlinson*, 41 Or. 198 (68 Pac. Rep. 406). Where a government plat, under which lands in a fractional township were sold, showed that a river is a boundary, the margin thereof, and not the meander lines run by the surveyor, determines the amount of land passing by the grant. *Hendricks v. Feather River Canal*, 138 Cal. 423 (71 Pac. Rep. 496). Where the meander line of an inland, meandered, navigable lake is not a boundary line of the fractional lots or tracts of land abutting thereon, the title of contiguous owners extends to all land between such line and the shore of the lake, precisely as though it were the result of accretions or relictions; and the boundaries of adjoining tracts, as to land beyond the meander line, are fixed by extending their side lines on a deflected course from their intersection with the meander line, toward a point in the center of the lake. Where there is a variance between the meander line established by the surveyors, as shown by the official plat of the survey, and the field notes, the former controls. *Hanson v. Rice*, 88 Minn. 273 (92 N. W. Rep. 982). A meander line is not,

as a general rule, a boundary line; yet the boundaries of fractional lots cannot be indefinitely extended where they appear by the government plat to abut on a body of water which in fact never existed at substantially the place indicated on the plat. In such exceptional cases, the supposed meander line will, if consistent with the other calls and distances indicated on the plat, mark the limits of the survey, and be held to be the boundary line of the land it delimits. *Security Land & Exploration Co. v. Burns*, 87 Minn. 97 (91 N. W. Rep. 304; 94 Am. St. Rep. 684); *Citing, Horne v. Smith*, 159 U. S. 40 (15 Sup. Ct. Rep. 988; 40 L. Ed. 68); *Niles v. Cedar Point Club*, 175 U. S. 300 (20 Sup. Ct. Rep. 124; 44 L. Ed. 171); *Fuller v. Shedd*, 161 Ill. 462 (44 N. E. Rep. 286; 33 L. R. A. 146; 52 Am. St. Rep. 380); *Whitney v. Lumber Co.*, 78 Wis. 240 (47 N. W. Rep. 425); *Grant v. Hemphill*, 92 Ia. 218 (59 N. W. Rep. 263; 60 N. W. Rep. 618); *Live Stock Co. v. Springer*, 35 Or. 312 (58 Pac. Rep. 102). To the same effect is the case of *Schlosser v. Hemphill*, 118 Ia. 452 (90 N. W. Rep. 842). For an exhaustive discussion of the rules prevailing in the state of Maine determining whether flats pass by a grant of upland, and what evidence is admissible in determining such question, see *Proctor v. Maine Cent. R. Co.*, 96 Me. 458 (52 Atl. Rep. 933).

Sec. 46. Locating lost corners. In the absence of physical evidence of the existence of a government corner or satisfactory oral evidence as to its location, the field notes and plat of the original government survey is the best evidence of its location and will prevail until overthrown by proof. *Knoll v. Randolph*, (Neb.) 92 N. W. Rep. 195. Where a corner of a tract of land conveyed by metes and bounds is not marked by any monument, natural or artificial, its location will be determined by the courses and distances of the conveyance according to the magnetic meridian. *Ayres v. Huddleston*, 30 Ind. App. 242 (66 N. E. Rep. 60).

Sec. 47. Lines, monuments, courses and distances. The actual location of a line controls, and, although a deed calls for a straight line between two points, if the line is in fact located and marked as a crooked line the latter controls. The rule is in such cases that it is a question for the jury, under all the evidence, to determine the actual

location of the line. *Johnson v. Harris*, (Ky.) 68 S. W. Rep. 844 (24 Ky. Law Rep. 449). A description by monuments will prevail over a specific description by lot number on a map or plat. *Stanwood v. Beck*, N. J. Eq. (52 Atl. Rep. 353). The rule that courses and distances must give way to natural objects will not be applied where the natural object is not clearly identified, and where it would cause a departure from other natural objects called for in the patent. *Bell County Land & Coal Co. v. Hendrickson*, (Ky.) 68 S. W. Rep. 842 (24 Ky. Law Rep. 371). Where a section line is in controversy it is the duty of the court to ascertain, if possible, the line as indicated by monuments and mounds established by the government surveyor, and such lines, when discovered, must prevail. *McGray v. Monarch Elevator Co.*, S. Dak.

(91 N. W. Rep. 457). See, on this point, *Trinwith v. Smith*, 42 Or. 239 (70 Pac. Rep. 816). Where a course cannot be run so as to touch all the natural objects called for, that course should be taken which will satisfy the most of the calls for natural objects. *Kentucky Land & Immigration Co. v. Crabtree*, Ky. (70 S. W. Rep. 31; 24 Ky. Law Rep. 31).

CEMETERIES.

EPITOME OF CASES.

Sec. 48. Power of cemetery trustees. Although the purchase of land by a cemetery company was made by parol, its board of directors can not make a sale of a part thereof for other than cemetery purposes without the consent of stockholders of the company and of those who had interred their dead in the cemetery upon the faith of its being perpetually used for the purposes for which it was dedicated. *Woodland Cemetery Co. v. Ellison*, (Ky.) 67 S. W. Rep. 14 (23 Ky. Law Rep. 2222). Trustees of a town cemetery, duly appointed by the proper municipal authorities and invested with power to acquire title to land for cemetery purposes and manage the same, to whom and "their suc-

cessors and assigns" lands are conveyed by a third party as a donation for a cemetery, are not without power to dispose of small parcels thereof, where the proceeds are used for the benefit of the cemetery; and especially the validity of such a sale cannot be questioned after it has been acquiesced in for more than the prescriptive period by the original donor, the cemetery board, and the public authorities. *City of Tacoma v. Tacoma Cemetery*, 28 Wash. 238 (68 Pac. Rep. 723).

Sec. 49. Rights of owner or user of cemetery lot.

Generally the right of one in a cemetery lot is an easement only, the right to use it for burial and cemetery purposes, but with no other interest in the fee. *McWhirter v. Newell*, 200 Ill. 583 (66 N. E. Rep. 345). Citing, *Perley's Mortuary Law*, p. 178; *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 503; *Hancock v. McAvoy*, 151 Pa. 464 (25 Atl. Rep. 47; 18 L. R. A. 781; 31 Am. St. Rep. 774). The placing of a granite monument in the corner of a burial lot in a cemetery, whether or not it be such a cemetery as is governed by Mass. Rev. Laws, ch. 78, §§ 26, 27, by one of several tenants in common to whom the lot belongs, is such an exclusive appropriation by such tenant to his own use of a part of the lot as the others may treat as an ouster, and they may remove the structure from the common land. *Capen v. Leach*, 182 Mass. 175 (65 N. E. Rep. 63). A widow, who buried the remains of her deceased husband in a burial plot belonging to his sister, with the consent of the latter, and who prepared the grave for the reception of her own remains after death, with like consent, knowing that the plot was so occupied that no consent would be given for other interments therein, is not entitled to require the owner of the plot to permit her to remove the remains merely because his children by a former wife (also buried therein) and his children by her cannot be buried there. *Smith v. Shepherd*, 64 N. J. Eq. 401 (54 Atl. Rep. 806). To sustain an action for damages, under Vt. Stat. §§ 5007, 5008, for the removal of a stone wall from about a burial ground, it must appear that the defendant acted maliciously. *Town of Fletcher v. Kezer*, 73 Vt. 70 (50 Atl. Rep. 558). The trustees of a public cemetery have no authority, after having once set aside and devoted a certain lot to a certain person or his family, to subsequently exercise any acts of con-

trol over the lot in the way of applying, or devoting it, or any portion of it, to the use of any other person, until the original grantee or owner of the license or easement in the lot, or his descendants and family, have abandoned the lot, either by removing from the vicinity of the cemetery, or by the extinguishment of the family as a component part of the community, or in some other way. *McWhirter v. Newell*, 200 Ill. 583 (66 N. E. Rep. 345).

CHARITABLE USES.

EPITOME OF CASES.

Sec. 50. Conveyances for—Validity—Definiteness required. A simple devise of real estate to an unincorporated charitable society is valid. *American Bible Soc. v. American Tract Soc.*, 62 N. J. Eq. 219 (50 Atl. Rep. 67). A devise to the National Christian Association, incorporated under the laws of the state of Illinois, an institution in the nature of an evangelical missionary society, the principal mission of which is the removal of things that hinder the kingdom of Christ on earth, is not rendered invalid because the chief tenet of the institution is opposition to secret societies. *Thomas v. National Christian Ass'n*, 63 Neb. 585 (88 N. W. Rep. 683). A devise to executors to be "paid over in such amounts and to such uses as they may, in their best judgment, determine, to such German charitable institutions and German societies in the city of Philadelphia as they may, in their discretion, select," was held valid, the court holding that it was apparent that institutions of a charitable nature were intended by both clauses. *In re Sleicher's Estate*, 201 Pa. St. 612 (51 Atl. Rep. 329). A bequest of a permanent fund in trust, the income of which is to be devoted for all time to the keeping of the testator's burial lot in a cemetery in good and proper condition, is not a charitable use. *In re Gray's Estate*, 138 Cal. 552 (71 Pac. Rep. 707; 94 Am. St. Rep. 70). See opinion for ex-

haustive collation of authorities on this subject. In Kentucky, a bequest in trust for masses for the repose of the souls of the testator and his mother and aunts was held valid. *Coleman v. O'Leary's Ex'r*, Ky. (70 S. W. Rep. 1068; 24 Ky. Law Rep. 1248). But such a bequest is void, under Minn. Gen. Stat. 1894, § 4274. In *re Shanahan's Estate*, 88 Minn. 202 (92 N. W. Rep. 948). A conveyance of property in trust to provide a home and school for "the orphan children of deceased Odd Fellows of the state of Kansas," is held not to be a valid public charity. *Cunningham, Pollock, and Burch, JJ., dissenting. Troutmar v. De Boissiere Odd Fellows' Orphans' Home & Industrial School Ass'n*, 66 Kan. 1 (71 Pac. Rep. 286). See conflicting opinions for exhaustive review of authorities on both sides of this question. A bequest to a Catholic bishop "to be applied to any charitable uses, and so as to do most good, in his judgment," was held invalid; and so was a devise of land to the order of the Society of Jesus, known as the "Jesuit Order" "for the purpose of education or religion." *Coleman v. O'Leary's Ex'r*, Ky. (70 S. W. Rep. 1068; 24 Ky. Law Rep. 1248). Applying Ky. Stat., § 317, giving validity to certain charities, where "the grant, conveyance, devise, gift, appointment or assignment shall point out, with reasonable certainty, the purposes of the charity and the beneficiaries thereof," it is held that a bequest of funds to be "collected by my executor, and by him distributed to the poor, in his discretion," is void for indefiniteness of beneficiaries. *Thompson's Ex'r v. Brown*, Ky. (70 S. W. Rep. 674; 62 L. R. A. 398; 24 Ky. Law Rep. 1066). See opinion for collation of interesting cases on this point. A devise of all the remainder of the testator's estate "to be invested and placed in trust with the Rt. Rev. Bishop of the Catholic Diocese of Louisville, and three others to be chosen by him, for the establishment of a home for poor Catholic men, as soon as the proceeds of my estate may justify it," will not be held invalid for indefiniteness, but may be administered by a court of equity, under 1 Rev. Stat., p. 236; and a proper construction of the devise authorizes the establishment of the home in Louisville and the selection of the beneficiaries from the Catholic poor men in that diocese. *Coleman v. O'Leary's Ex'r*, Ky. (70 S. W. Rep. 1068; 24 Ky. Law Rep. 1248). See opinion for how far Stat. 43 Eliz. is in force in Kentucky. For particular devises held to create charitable

trusts, see *Appeal of Eliot*, 74 Conn. 586 (51 Atl. Rep. 558); *Bruere v. Cook*, 63 N. J. Eq. 624 (52 Atl. Rep. 1001). For particular institutions held capable of taking devise for charity, see *Minns v. Billings*, 183 Mass. 126 (66 N. E. Rep. 593).

Sec. 51. Construction of charitable devises. An absolute gift and not one in trust is created by a devise in which the testator gives the remainder of his estate absolutely to a certain society and charges it with the duty of employing the property "in counteracting as far as may be" a certain doctrine which he describes, and of doing this "according to their wisdom and judgment, chiefly by publications," such society being legally organized and engaged in the work desired done by the testator. *Pierce v. Phelps*, 75 Conn. 83 (52 Atl. Rep. 612). In construing a devise of a certain sum to be given and distributed by the testator's executors "for such religious, charitable, or educational or other purposes as they may deem advisable," it is held that the addition of the words "or other purposes" empowered the executors to devote the bequest to purposes not charitable, and it was therefore void. *Hyde's Ex'rs v. Hyde*, 64 N. J. Eq. 6 (53 Atl. Rep. 593). The court say: "But the serious difficulty in this case arises from the other contention on the part of complainants, namely, that the clause in question confers a power upon the executors unlimited to charitable uses, by making use of the words 'or other' to express some of the purposes permitted. These words can not be construed as intended to to be read, 'other such,' 'other like,' or 'other of the same kind,' for such a construction would make them mere surplusage, and deprive the clause of meaning. If so construed the words simply repeat the idea 'charitable' previously expressed. For there are other charitable purposes than those which are educational or religious, such as the care of the poor, the sick, etc. But those purposes are naturally included in the expression 'charitable purposes.' Therefore, when the testator adds the words 'or other,' the clause looked at by itself, clearly expresses the intent to permit the trustees to devote the fund, if they choose to do so, to purposes other than those which are educational or religious or charitable. This view requires a declaration that the gift is void."

Sec. 52. Power of corporations to take and administer charitable trusts. It may be stated as a general proposi-

tion of law that a corporation capable of holding real estate is capable also of executing a charitable trust, unless the statute or the articles of incorporation prohibit it. And unless specially restrained, municipal corporations may take and hold property in their own right by direct gift, conveyance, or devise, in trust for purposes germane to the objects of the corporation, or for purposes which will promote, aid, or assist in carrying out or perfecting those objects. Applying these general principles, it is held that a devise to a city in trust for the establishment of a college for the education of orphan boys in the county and state, creates a valid charitable trust, although by the laws of the state the maintenance of schools was left to the school districts. Where, by the terms of such devise, it is evident that the testator did not intend that the city should be called upon to accept or reject the trust until after establishment of the college by the executors; the legislature may in the mean time give the city express power to act as trustee in such a case, which will operate as an effective bar to defeating the trust on account of any incapacity in the city at the time of the testator's death. *Clayton v. Hallett*, 30 Colo. 231 (70 Pac. Rep. 429; 59 L. R. A. 407). See opinion for elaborate review of authorities on the subject of charitable trusts.

Sec. 53. Power of courts. In New Jersey courts of equity have power to administer charitable trusts, independent of Stat. 43 Eliz., ch. 4. *Hyde's Ex'rs v. Hyde*, 64 N. J. Eq. 6 (53 Atl. Rep. 593). In the administration of charitable trusts a court of equity has power to remove or discharge trustees and appoint new trustees in their place; and this power may be exercised when there is a failure of suitable trustees to perform the trust, either from original or supervenient incapacity to act. *Lanning v. Commissioners of Public Instruction*, 63 N. J. Eq. 1 (51 Atl. Rep. 787). A grant of land for cemetery purposes "to the inhabitants" of certain school districts in a town, such districts being incapable of receiving the grant, and it being too indefinite to confer any title upon the inhabitants, will be given effect by a court of equity appointing trustees to control the property for the purposes specified. *Hunt v. Tolles*, 75 Vt. 48 (52 Atl. Rep. 1042). Members of a church have a standing in court to compel a board of trustees to administer a fund in accordance with the will of the testator, who left it to enable the board

to take care of their poor. Courts will interpose their authority as it may needful to safeguard the fund. *Von Hoven v. Immanuel Presbyterian Church*, 108 La. 274 (32 So. Rep. 389).

Sec. 54. Church property. An unincorporated church society is without power to hold or acquire title to property; and as deacons of a church, no persons have capacity either to acquire in themselves or to transmit to successors in that ecclesiastical office any rights amounting to title in easements. *Stewart v. White*, 128 Ala. 202 (30 So. Rep. 526; 55 L. R. A. 211). In case of a division among the members of an incorporated religious society, the minority cannot force a sale of its property for the purpose of partition. *LeBlanc v. Lemaire*, 105 La. 539 (30 So. Rep. 135). A majority faction in an established church, which severs its connection therewith, forms an independent organization under a new name and repudiates the creed of the old organization, has no right to property deeded in trust to such organization. *Mt. Helm Baptist Church v. Jones*, 79 Miss. 488 (30 So. Rep. 714). Ky. Stat., §§ 320-322 construed and applied—appointment of trustees to hold property of churches in which there is a schism or division. *Bennett v. Morgan*, 112 Ky. 512 (66 S. W. Rep. 287; 23 Ky. Law Rep. 1924).

COMMUNITY PROPERTY.

[In Vol. III, §§ 70-87; Vol. IV, §§ 68-71; Vol. V, §§ 65-69; Vol. VI, §§ 109-116; Vol. VII, §§ 60-64; Vol. VIII, §§ 65-71; Vol. IX, §§ 65-70, will be found a compilation of the statutes and decisions of the several states and territories on the subject of Community Real Estate. Below we give such amendments, changes and additional constructions as have been made.]

Sec. 55. California.

(See Vol. III, § 80; Vol. IV, § 68; Vol. V, § 65; Vol. VI, § 110; Vol. VII, § 60; Vol. VIII, § 66; Vol. IX, § 65.) Lands purchased by a husband moving into the state with the proceeds of his separate property in another state are not community property. In

re Burrow's Estate, 136 Cal. 113 (68 Pac. Rep. 488). A husband's rights as survivor of his wife in a homestead selected from community property, under Code Civ. Proc., § 1474, are not destroyed by a deed of such homestead to the wife signed by the husband alone, and a subsequent deed by her alone to a third party. *Pryal v. Pryal*, Cal. (71 Pac. Rep. 802).

A husband can not, by a provision in his will, authorize the sale of community property except to pay debts; and a sale under such a provision adversely affects the wife's interest in the community. In *re Wickersham's Estate*, Cal. (70 Pac. Rep. 1079).

Sec. 56. Louisiana.

(See Vol. III, § 82; Vol. IV, § 69; Vol. V, § 66; Vol. VI, § 112; Vol. VII, § 61; Vol. VIII, § 68; Vol. IX, § 67.) All property of whatsoever kind, whether standing in the name of the husband, or that of the wife, or in their joint names, is presumed by the law to be community in character. Even the earnings of the wife's industry and labor fall into the community. And where a married woman, not separate in property, is engaged in trade, she is presumed, in the absence of proof to the contrary, to trade on the funds of the community, and the assets in her hands are those of the community. The legal presumption in favor of the community dispenses those claiming community rights or asserting community obligations from other proof, and it is incumbent on those denying the community and asserting the property or funds to be the separate estate of the wife to prove affirmatively and satisfactorily that the same is hers. *Manning v. Burke*, 107 La. 456 (31 So. Rep. 862). Property purchased by the husband during the existence of the community is presumed to have been acquired for the community, and will be held to belong to the community, unless the husband at the time of the purchase, clearly manifested the intention to acquire for his own account, with his separate funds. *Succession of Muller*, 106 La. 89 (30 So. Rep. 329). A probate sale of community property in the succession of a father to pay a community debt secured by special mortgage and vendor's privilege upon it conveys the property to the purchaser thereof free from mortgages standing upon it in the name of the deceased. *Childs v. Lockett*, 107 La. 270 (31 So. Rep. 751).

Sec. 57. New Mexico.

(See Vol. III, § 85; Vol. VI, § 114; Vol. VII, § 62; Vol. VIII, § 69; Vol. IX, § 68.) The law creates a presumption that property acquired during coverture is community property, and is subject to the payment of community debts, and this presumption casts the burden of proof upon the claimant of a separate estate. It is also a presumption of law that any debt contracted during coverture is a community debt. *Brown v. Lockhart*, N. Mex. (71 Pac. Rep. 1086).

Sec. 58. Texas.

(See Vol. III, § 86; Vol. IV, § 70; Vol. V, § 68; Vol. VI, § 115; Vol. VII, § 63; Vol. VIII, § 70; Vol. IX, § 69.) The law presumes that all property acquired during marriage is community property, and the burden is on the administrator of the deceased husband to prove the right of the husband's separate estate to reimbursement out of the community. *Allardyce v. Hambleton*, 96 Tex. 30 (70 S. W. Rep. 76). Lands purchased by a husband after moving into Texas, with funds earned by him while a citizen of another state, and which under its laws constituted his separate property, are not community property, *Blethen v. Bonner*, 30 Tex. Civ. App. 585 (71 S. W. Rep. 290); and the same is true of lands deeded to a wife by a third party in part payment of a loan made by her to him out of funds given to her by her husband, *Hall v. Levy*, 31 Tex. Civ. App. 360 (72 S. W. Rep. 263). Lands bought partly for cash and partly on credit are community property, where the cash payment is made out of community funds, although the credit payment was made by the husband out of his separate property; but they are chargeable with the amount paid by him. *Moore v. Moore*, 28 Tex. Civ. App. 600 (68 S. W. Rep. 59). Damages for being ousted from land purchased by a husband, and on which he and his wife were residing, are community property and can be sued for only by him. *Jackson v. Bradshaw*, 28 Tex. Civ. App. 394 (67 S. W. Rep. 438). A purchaser at a surviving husband's sale of community lands to pay community debts is not obliged to see that the proceeds of the sale are so applied; nor is he affected by the husband's subsequent declaration that he had transferred his property for another purpose,—that of defrauding his creditors. *Cruse v. Barclay*, 30 Tex. Civ. App. 211 (70 S. W. Rep. 358). Rev. Stat., arts. 2183-2185, construed and applied—right of surviving husband or wife to partition of common property, and effect thereof. *Yates v. Yates*, Tex. Civ. App. (68 S. W. Rep. 708). See, also, *Moor v. Moor*, 31 Tex. Civ. App. 137 (71 S. W. Rep. 794). Rev. Stat., arts. 2227, 2236, 2237, construed and applied—respective rights of creditors and surviving widow after her remarriage. *Wingfield v. Hackney*, 95 Tex. 490 (68 S. W. Rep. 262). As to validity and effect as an estoppel of a deed to homestead in which the wife does not join, see *Colonial & U. S. Mortg. Co. v. Thretford*, 27 Tex. Civ. App. 152 (66 S. W. Rep. 103). As to widow's rights in partnership assets as community property, see *Milan v. Hill*, 29 Tex. Civ. App. 573 (69 S. W. Rep. 447).

Sec. 59. Washington.

(See Vol. III, § 87; Vol. IV, § 71; Vol. V, § 69; Vol. VI, § 116; Vol. VII, § 64; Vol. VIII, § 71; Vol. IX, § 70.) The laws of the state govern in determining whether land entered by the husband under the United States homestead law, during the life of his wife, but as to which he did not make final proof or obtain a patent until after her death, is community property; and under these laws such prop-

erty is community property. *Ahern v. Ahern*, 31 Wash. 334 (71 Pac. Rep. 1023; 96 Am. St. Rep. 912; see pp. 916-924 for exhaustive note on "Whether real property granted by a government to a citizen is separate or community property.") Community real estate, although it stands in the name of the husband, is not subject to the payment of his debts, and his conveyance thereof to his wife is not a fraud upon his separate creditors. *Deering v. Holcomb*, 26 Wash. 588 (67 Pac. Rep. 240).

CONTRACTS.

EPITOME OF CASES.

Sec. 60. Contracts against public policy—Validity—Enforcement upon waiver of invalidity. A contract having for its purpose the lessening of competition at a judicial sale will not be enforced. *Nitrophosphate Syndicate v. Johnson*, 100 Va. 774 (42 S. E. Rep. 995). An agreement to convey land to one in consideration of his effort to procure the location of a railroad depot thereon will be held unenforceable as against public policy, when it appears that the party with whom it was made had a side agreement with certain officers of the railroad corporation whereby each of them was to receive a specified portion of the proceeds of all lands so conveyed to the proposed vendee. *Reed v. Johnson*, 27 Wash. 42 (67 Pac. Rep. 381; 57 L. R. A. 404). See opinion for review of authorities.

A contract void as against public policy will not be enforced because of a waiver of its illegality by a party thereto, nor can it be given validity through the principle of estoppel. *Reed v. Johnson*, 27 Wash. 42 (67 Pac. Rep. 381; 57 L. R. A. 404). The court say: "It cannot be successfully urged that appellants have waived objection to the illegality of this contract by not specially pleading the same. The nonenforcement of illegal contracts is a matter of common public interest, and a party to such contract cannot waive his right to set up the defense of illegality in an action thereon by the other party. It is not necessary to specially plead the defense of illegality, but, when the same is made to appear to the court

at any stage of the case, it becomes the duty of the court to refuse to entertain the action. The above statements of the law are sustained by the following cases: *Oscanyon v. Arms Co.*, 103 U. S. 261 (26 L. Ed. 539); *Coppell v. Hall*, 7 Wall. 542 (19 L. Ed. 244); *Cardoze v. Swift*, 113 Mass. 250; *Wilde v. Wilde*, 37 Neb. 891 (56 N. W. Rep. 724); *Sheldon v. Pruessner*, 52 Kan. 579 (35 Pac. Rep. 201; 22 L. R. A. 709); *Craig v. Missouri*, 4 Pet. 410 (7 L. Ed. 903); *Johnson v. Hulings*, 103 Pa. 498 (49 Am. Rep. 131); *Wight v. Rindskopf*, 43 Wis. 344; *Kreamer v. Earl*, 91 Cal. 112 (27 Pac. Rep. 735); *Morrill v. Nightingale*, 93 Cal. 452 (28 Pac. Rep. 1068; 27 Am. St. Rep. 207); *Schmidt v. Barker*, 17 La. Ann. 261 (87 Am. Dec. 527); *Clafin v. Credit System Co.*, 165 Mass. 501 (43 N. E. Rep. 293; 52 Am. St. Rep. 528); *Richardson v. Buhl*, 77 Mich. 632 (43 N. W. Rep. 102; 6 L. R. A. 457). The appellants are not estopped to raise the illegality of the contract because of their course of dealing with respondents under the contract. Validity cannot be given to an illegal contract through any principle of estoppel. 1 *Warv. Vend.* p. 162, § 4; *Durkee v. People*, 155 Ill. 354 (40 N. E. Rep. 626; 46 Am. St. Rep. 340); *Brown v. Bank*, 137 Ind. 655 (37 N. E. Rep. 158; 24 L. R. A. 206); *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138 (18 Sup. Ct. Rep. 808; 43 L. Ed. 108). While one is not estopped to raise the illegality of a contract, yet he is not entitled to recover for losses thereunder. In *Howell v. Fountain*, 3 Ga. 176 (46 Am. Dec. 415), the court said: 'The law leaves the parties to such a contract where it finds them. If either has sustained a loss by the bad faith of a particeps criminis, it is but a just infliction for premeditated and deeply-practiced fraud, which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from one to the other, or to equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of laws.' "

Sec. 61. Breach of contract—Measure of damages.

In Virginia the vendee's measure of damages for breach of contract for the sale of real estate is the purchase money paid with interest. *Stuart v. Pennis*, 100 Va. 612 (42 S. E. Rep. 667). The fact that through unforeseen circumstances it be-

comes difficult and expensive, but not impossible, for a good faith vendor to convey with clear title, does not make him liable for only nominal damages, but he is liable for the difference between the actual worth of the land and the price the vendee agreed to pay. *Cornell v. Rodabaugh*, 117 Ia. 287 (90 N. W. Rep. 599; 94 Am. St. Rep. 298). A vendor suing on a contract by his vendee to take certain lots and pay a specified price therefor, is not limited to a recovery of the difference between the agreed price and the fair market value, but may recover on the basis of the contract. *Gray v. Meek*, 199 Ill. 136 (64 N. E. Rep. 1020).

Sec. 62. Fraud and misrepresentation. A misrepresentation, the falsity of which will afford a ground of action for damages or a bill for the rescission of a contract, must be as to an existing fact. It must be an affirmative statement or affirmation of some fact, in contradistinction to a mere expression of opinion which ordinarily is not presumed to deceive or mislead. The statements must have been made for the purpose of procuring the contract. They must be material. They must be untrue, and the party to whom they were made must have relied upon them, and been induced by them to enter into the contract. *Dudley v. Minor's Ex'r*, 100 Va. 728 (42 S. E. Rep. 870). A landlord is liable for loss of goods by fire sustained by a tenant who was induced to lease the premises upon the false representations of the landlord's agent that a certain wall, not open to inspection, was a fire wall, where the agent had authority to show the premises, make leases, put tenants in possession and collect the first month's rent; and this liability is not affected by the fact that the agent believed the representation to be true, and had no intention to deceive the tenant. *Matteson v. Rice*, 116 Wis. 328 (92 N. W. Rep. 1109). A vendee's acceptance of a contract with knowledge of his vendor's fraud in procuring it, merely extinguishes his right to rescind the sale, but does not bar his setting up a claim for damages on account of the fraud, in an action to recover the purchase money. *Allen v. Henn*, 197 Ill. 486 (64 N. E. Rep. 250). For particular fact case as to right of vendee to rely on representations made by the vendor's agent, see *Samson v. Beale*, 27 Wash. 557 (68 Pac. Rep. 180).

Sec. 63. Fraud—Representations as to quality, value and title. False representations by a vendor as to the number of acres in cultivation and the profits realized therefrom during the previous years may be ground for rescission. *Evans v. Duke*, Cal. (69 Pac. Rep. 688). Equity will relieve a vendee from a contract of purchase procured through the vendor's false and fraudulent representations that the land was first class, high, dry, river-bottom land, not subject to overflow and covered by valuable timber except forty acres which was in a high state of cultivation. *Allen v. Henn*, 197 Ill. 486 (64 N. E. Rep. 250). Statements of value made effective by false recitals of consideration in fictitious deeds and mortgages may constitute fraud, there being evidence of conspiracy to defraud between the parties to such instruments. *Leonard v. Springer*, 197 Ill. 532 (64 N. E. Rep. 299). False representations as to the value of land made by one acquainted with its value to the owner thereof ignorant of its true value and when he was far away from the land, in connection with an offer by the maker to buy the land, which the owner is informed he must accept at once, if at all, and that if he does not accept, the land will be lost to him through tax proceedings, will be treated as representations of fact. *Stack v. Nolte*, 29 Wash. 188 (69 Pac. Rep. 753). A complaint alleging that the plaintiff was induced to purchase a tract of land by the false representation of the defendant that he owned it, knowingly made, is sufficient to sustain an action for deceit, under Cal. Civ. Code, §§ 1709, 1710. *Hoffman v. Kirby*, 136 Cal. 26 (68 Pac. Rep. 321). To authorize an action against a vendor for fraudulent representations as to his boundaries, it must be shown that he knew them to be false; and no damages can be awarded a vendee in such a case where he has undisturbed possession to the extent of the represented boundaries, and there is no proof of title to any part of it in another. *Equitable Trust Co. v. Milligan*, 31 Ind. App. 20 (64 N. E. Rep. 673).

Sec. 64. Rescission of contracts. A written contract for the sale and purchase of real estate may be waived and the contract annulled and extinguished by parol; and the rescission of such a contract will be presumed from a surrender of possession by the vendee, and an acceptance of it by the vendor, and a subsequent sale by the vendor, as against either party who should attempt to enforce the contract.

Mahon v. Leech, 11 N. Dak. 181 (90 N. W. Rep. 807). A vendor in default in the performance of his part of an option contract for the sale of land cannot have a cancellation of the contract on account of the vendee's failure to make payments within the specified time. *Vankirk v. Patterson*, 201 Pa. St. 90 (50 Atl. Rep. 966). A breach of a covenant of warranty and seisin by a vendor shown to be insolvent authorizes a rescission by the vendee; and where in such a case it appears that the purchase money notes given by the vendee have been paid and the money invested in other land by the vendor, who had only a life estate in the land he conveyed, a recovery by his vendee of the purchase money paid may be satisfied by sale of such life estate and the land so purchased by such vendor, if necessary. *Matthews v. Crowder*, Tenn.

(69 S. W. Rep. 779). When a deed is made in pursuance of a contract of sale of real estate, entered into under a misapprehension or in ignorance of the location of the vendor's land, and conveys to the purchaser a tract of land wholly different in location and character from the land contracted for, a court of equity will, at the suit of the vendee, rescind the contract of sale and put the parties in statu quo, although there was no fraudulent intent on the part of the grantor. In such case rescission results from the mutual mistake under which the parties entered into the contract. *Fearon Lumber & Veneer Co. v. Wilson*, 51 W. Va. 30 (41 S. E. Rep. 137). When, in a contract for the exchange of real estate, it is expressly stipulated the contract when made shall not be binding upon the parties thereto, but is made subject to an investigation of the property of one party by the other, and made to depend upon the result of such investigation proving satisfactory to the other party, the party so agreeing to make investigation assumes the responsibility of making such full and complete examination of the property as he may desire to satisfy himself as to the truth or falsity of the representations made by the other party, and the advisability of making the exchange; and if after making an examination of the property he signifies his satisfaction therewith by closing the trade and exchanging title papers, he cannot rescind the contract upon the ground he was induced to make it in reliance upon false representations made by the other party to induce the trade, unless some fraud is practiced upon him by the other party which prevents his making a full, fair, and complete examination of the property. *Munkres v. McCaskill*, 64 Kan. 516 (68

Pac. Rep. 42). Although the time within which one must elect to rescind a contract may be extended by a promise on the part of the other party to remedy the wrong, such a promise will not preserve the right of rescission to one who has acquiesced in the transaction for more than fifteen years without fulfillment of the promise. *Horner v. Lowe* 159 Ind. 406 (64 N. E. Rep. 218).

CORPORATIONS.

EPITOME OF CASES.

Sec. 65. Ownership of land by corporations. The question as to whether a corporation exceeds its powers in the acquisition of realty can only be raised by the state. *Springer v. Chicago Real Estate L. & T. Co.*, 202 Ill. 17 (66 N. E. Rep. 850). Where a deed to a corporation is delivered and accepted after its incorporation, its validity is not affected by the fact that it was dated before such incorporation. *San Diego Gas Co. v. Frame*, 137 Cal. 441 (70 Pac. Rep. 295). One who has contracted to sell land to a corporation cannot question its right to take and hold the property after it has erected valuable improvements thereon for the purposes of its corporate business and in reliance upon the contract. *Cole-ridge Creamery Co. v. Jenkins*, Neb. (92 N. W. Rep. 123). Under W. Va. Code, ch. 53, § 24, a mining corporation, after it is fully organized, may purchase real and personal estate for the use of such corporation, and for its other corporate purposes and business, at such price, and upon such terms and conditions, as may be agreed upon by the owners and directors or stockholders of such corporation, and may pay for such property by issuing so many shares of its capital stock to the vendor as are equal in amount at par value to the price agreed upon for such property, but not to exceed its authorized capital. *Merchants' & Mechanics' Sav. Bank v. Belington Coal & Coke Co.*, 51 W. Va. 60 (41 S. E. Rep. 390). A foreign corporation authorized by its charter to do so may acquire property in Texas by purchase made outside the state, and such purchase is not the transaction of business, within the

meaning of Rev. Stat., arts, 745, 746. prohibiting the transaction of business within the state by a foreign corporation without a license. *Lakeview Land Co. v. San Antonio Trac-tion Co.*, 95 Tex. 252 (66 S. W. Rep. 766). Kan. Laws 1891, ch. 3 construed and applied—power of foreign corporations to hold real estate—forfeiture to state. *Omnium Inv. Co. v. North American Trust Co.*, 65 Kan. 50 (68 Pac. Rep. 1089).

Sec. 66. Contracts and conveyances by corporations.

Construing and applying Vt. Stat., § 2212, providing that a corporation can convey real estate only by a deed executed by an agent appointed by a vote for that purpose, it is held that a conveyance must be made in the name of the principal; and a deed in the name of the agent is not sufficient, although attested with the corporate seal. *Hutchins v. Barre Water Co.*, 74 Vt. 36 (52 Atl. Rep. 70). The fact that the directors' meeting authorizing a mortgage given to secure bonds was held in another state cannot be asserted so as to invalidate the mortgage as to a judgment creditor whose judgment was obtained after the recording of the mortgage, where the corporation has had the full benefit of the bonds which the mortgage was given to secure. *Schulte v. Van Doren*, 64 N. J. Eq. 465 (53 Atl. Rep. 815). The signature of a corporation mortgagee to the assignment of the mortgage being partly translated into a foreign language does not invalidate the instrument where the name of the corporation is correctly given in the certificate of acknowledgment and seal. *Woronieki v. Pairskiego*, 74 Conn. 224 (50 Atl. Rep. 562).

Sec. 67. Municipal corporations. A city having power to purchase real property for its own use may purchase land and erect thereon a city building, including a city hall, for municipal purposes, and the exercise of this power cannot be enjoined because the sum proposed to be expended is unreasonable, so long as those having the power to act proceed in good faith. *Parker v. City of Concord*, 71 N. H. 468 (52 Atl. Rep. 1095). An agreement between an individual, a city, and an institution owning land which it could not alienate, that the city should condemn the land for park purposes and then sell part of it to the individual, is not enforceable. *Dris-coll v. City of New Haven*, 75 Conn. 92 (52 Atl. Rep. 618). A county lawfully engaged in the construction of a road is liable for wrongfully draining the waters of a lake onto the

land of another to its injury, irrespective of negligence; and it cannot escape liability on the ground that the act was ultra vires. *Wendel v. Spokane County* 27 Wash. 121 (67 Pac. Rep. 576; 91 Am. St. Rep. 825).

Sec. 68. Municipal corporations—Power to convey land to industrial exposition company without consideration. A city may be authorized by statute (Minn. Sp. Laws 1881, ch. 76, subc. 4, § 14; Sp. Laws 1887, ch. 15, § 3; Sp. Laws 1891, ch. 131, § 1) to convey land, without any consideration, to an industrial exposition company. *City of Minneapolis v. Janney*, 86 Minn. 111 (90 N. W. Rep. 312). In discussing this subject the court say: "If by the action of the council the property of the city was appropriated to private purposes, its value must sooner or later be made up through taxation, in violation of the fundamental law; but it is incumbent upon us to point out the specific provision of the constitution, either expressed or clearly implied from what is expressed, which was transgressed by the acts of the legislature authorizing the conveyances. If there was a violation, the necessary result is taxation for a private purpose. A court will never declare a statute invalid unless its invalidity is, in its judgment, placed beyond reasonable doubt. This is a well-settled rule. *Lommen v. Gaslight Co.*, 65 Minn. 207 (68 N. W. Rep. 53; 33 L. R. A. 437; 60 Am. St. Rep. 450). The presumptions are all in favor of the validity of the legislation called in question. If it be doubtful that the legislature had the power, which it has seen fit to exercise, the rule is that the judiciary will not interfere. This doctrine is well stated in *State v. Cornell*, 53 Neb. 556 (74 N. W. Rep. 59; 39 L. R. A. 513; 68 Am. St. Rep. 629), as follows: 'To justify a court in declaring a tax invalid on the ground that it was not imposed for the benefit of the public, the absence of a public interest in the purpose for which the money is raised by taxation must be so clear and palpable as to be immediately perceptible to every mind.' See, also, *Booth v. Town of Woodbury*, 32 Conn. 118. What constitutes a public purpose justifying the invoking of the power of taxation has again and again been stated and elaborated upon, but we find no case in which the subject is so clearly and concisely considered and formulated as it is in *Town of Bennington v. Park*, 50 Vt. 178; the opinion being written by Judge Powers. It is impossible to improve upon the language or argument of this learned

jurist, which we quote at length: 'It is agreed on all hands that the money of the citizen can be taken under the guise of taxation only when it is appropriated to a public purpose. No formula has as yet been devised by which to determine what is or is not a public use or purpose, within the meaning of the constitutional prohibition. But it is clear that the ultimate advantage of the public, as contradistinguished from that of the individual, is its characteristic feature. It is true that a proposed work may be of great utility to both the public and the individual, and still, according to circumstances, be either public or private in its character and quality. Men set up systems of government in order to subserve certain public ends, and reach advantages that could not otherwise be made available. The state is clothed with the trust of answering these ends. It is not to be limited to the mere duty of governing the people by the exercise of its police power, but it has a higher duty,—to promote the educational interests of the people, encourage their industrial pursuits, develop its material resources, and foster its commercial interests, by providing all reasonable facilities demanded by a prudent regard for the growth, development, and general prosperity of a free people; and the state is not to be tied down to any narrow and merely utilitarian policy in promoting the prosperity of its citizens. The problem is not how little, but how much, can be done to elevate the people to the highest plane of material and political prosperity. Schools, colleges, charitable and reformatory institutions, institutions for the development of the arts and sciences, roads, bridges, canals, and countless other internal improvements, have been established and constructed at the public expense by all thrifty states, ancient and modern, and no serious question has been made as to the propriety of such expenditures.' This same question has arisen in a number of cases where appropriations of public funds have been made by states, counties, cities, or towns in aid of displays of their material resources at the various expositions which have been held in the last few years. In nearly all of them the constitutional provision construed has been similar to the one appealed to and relied upon in the present instance. In some cases the events to be recognized and celebrated by the expositions have been anniversaries of great note and importance, but that fact has never been given much prominence, nor regarded as controlling. No reason can be given why it should be. In one case the court commented on the fact that the anniversary of

the admission of the state into the American Union was to be celebrated, but then said: 'The exposition is reasonably expected to attract great and favorable attention throughout the country, and be participated in and largely attended by intelligent and enterprising citizens of numerous other states. * * * It is beyond plausible debate that such an exhibition is well calculated to advance the material interests and promote the general welfare of the people of the country making it. It will excite industry, thrift, development, and worthy emulation in different avenues of commerce, agriculture, manufacture, art, and education within the county, thereby tending to the betterment and prosperity of her people. In short, it will encourage progress, and progress will insure increased intelligence, wealth, and happiness for her people, individually and collectively. Undeniably, that which promotes such an object and facilitates such a result in any county is to that county a "county purpose," in the truest sense.' *Shelby Co. v. Tennessee Centennial Exposition Co.*, 96 Tenn. 653 (36 S. W. Rep. 694; 33 L. R. A. 717). Other cases in which the question has been considered, and to which we refer, are *Norman v. Board*, 93 Ky. 537 (20 S. W. Rep. 901; 18 L. R. A. 556); *Daggett v. Colgan*, 92 Cal. 53 (28 Pac. Rep. 51; 14 L. R. A. 474; 27 Am. St. Rep. 95); *State v. Cornell*, 53 Neb. 556 (74 N. W. Rep. 59; 39 L. R. A. 513; 68 Am. St. Rep. 629); *State v. Tappan*, 29 Wis. 664 (9 Am. Rep. 622). The proposition that expositions of the character of the one now under consideration are so far public in their character and effect as to justify public aid in the form of appropriations, and that by means of these appropriations public funds are not diverted to private purposes, is well settled by these adjudications. Of course, it is impossible to distinguish between appropriations for expositions in the state or municipality making the same and appropriations for expositions in other states or municipalities, for in each case the money is taken from the public treasury for identically the same purpose or object, and it must be either a public or private one. But the fact is that the benefits to be anticipated, such as the impetus to present or future growth, the additional prosperity which it brings at once, or the education of the people, must be very much greater where the exposition is to be held in the state or city making the appropriation than where is to be held elsewhere."

COVENANTS.

EPITOME OF CASES.

Sec. 69. Covenants running with the land. Where the owners of land platted into lots with streets and parks convey the streets and parks to trustees whom they empower to improve them and covenant for themselves and successors in title that the lots should be chargeable with assessments therefor, the covenant runs with the land. *Stevens v. Annex Realty Co.*, 173 Mo. 511 (73 S. W. Rep. 505). Applying N. C. Code, § 1334, it is held that persons claiming under a grantee in a deed containing a covenant of warranty to him, but not to his heirs or assigns, cannot rely on the covenant to prevent the original grantor from reclaiming the land because of the invalidity of his grant. *Smith v. Ingram*, 130 N. C. 100 (40 S. E. Rep. 984; 61 L. R. A. 878). In Nebraska, a covenant against incumbrances does not run with the land. *Waters' Estate v. Bagley*, (Neb.) 92 N. W. Rep. 637. A remote grantee may recover on a prior grantor's covenant of warranty upon his eviction by a title paramount to that of such grantor, although the deed under which he immediately claims is without warrant. *Ravenel v. Ingram*, 131 N. C. 549 (42 S. E. Rep. 967).

Sec. 70. Covenants of warranty. A general warranty in a deed relates only to title, and does not warrant the quantity of land stated in it. *Adams v. Baker*, 50 W. Va. 249 (40 S. E. Rep. 356). A covenant of warranty is inseparable from the land with respect to which it is made, and passes to the vendee of the covenant as incident to the land, and not as an assignment, separate and distinct from the conveyance. After breach of such covenant, it can no longer run with the land, nor has it any existence or virtue, save for the purpose of supporting a right of action for damages on the part of him who held it at the time of the breach, against the covenantor.

McConaughey v. Bennett's Ex'rs, 50 W. Va. 172 (40 S. E. Rep. 540).

Sec. 71. Covenants against incumbrances. A covenant against incumbrances in a warranty deed is broken, if at all, when made, and does not run with the land. *Sears v. Broady*, Neb. (92 N. W. Rep. 214); *Waters' Estate v. Bagley*, (Neb.) 92 N. W. Rep. 637. An easement of light is an incumbrance. *Denman v. Mentz*, 63 N. J. Eq. 613 (52 Atl. Rep. 1117). Citing, *Huyck v. Andrews*, 113 N. Y. 84 (20 N. E. Rep. 581; 3 L. R. A. 789; 10 Am. St. Rep. 432). The preliminary survey of a way made by the board of survey and filed in the city surveyor's office, under Mass. Stat. 1891, ch. 323, is not an incumbrance on the land. *French v. Folsom*, 181 Mass. 483 (63 N. E. Rep. 938).

An assessment against property for municipal improvements which has not been so fully confirmed as to become a lien, under N. Y. Laws 1897, ch. 378, §§ 159, 986 and 1017, is not a breach of a covenant in a deed that the property was "then free from incumbrance." *Real Estate Corp. v. Harper*, 174 N. Y. 123 (66 N. E. Rep. 660). A covenant against incumbrances in a deed conveying property after the improvement of a street on which it abuts extends to a re-assessment of the cost of the improvement on account of the first assessment having been adjudged illegal. *Green v. Tidball*, 26 Wash. 338 (67 Pac. Rep. 84; 55 L. R. A. 879). The court say: "The cases on this question are not uniform. New York especially has held that a tax or assessment is not an incumbrance, within the meaning of a covenant against them, until the amount thereof is ascertained or determined. *Harper v. Dowdney*, 113 N. Y. 644 (21 N. E. Rep. 63). However, we think the weight of authority, as well as the better reason, is the other way. See *Cadmus v. Fagan*, 47 N. J. L. 549 (4 Atl. Rep. 323); *White v. Stretch*, 22 N. J. Eq. 76; *Campion v. City of Elizabeth*, 41 N. J. L. 355; *Blackie v. Hudson*, 117 Mass. 181; *Carr v. Dooley*, 119 Mass. 294; *Tibbetts v. Leeson*, 148 Mass. 102 (18 N. E. Rep. 679); *Peters v. Myers*, (2d Ed.) 22 Wis. 674; *Lafferty v. Milligan*, 165 Pa. 534 (30 Atl. Rep. 1030); *Barnhart v. Hughes*, 46 Mo. App. 318."

Sec. 72. Breach of covenants—Eviction. To constitute a breach of warranty there must be an eviction of the covenantee under a paramount title. *Boulden v. Wood*, 96 Md.

332 (53 Atl. Rep. 911). No recovery can be had on the covenant of warranty unless there has been an actual eviction, surrender, or attorning by reason of a paramount title. *Sears v. Broady*, Neb. (92 N. W. Rep. 214); *Merrill v. Suing*, Neb. (92 N. W. Rep. 618). If, at the time a covenant of general warranty is made, the land conveyed is actually in the possession of a third party, holding the same under a paramount title, there is an eviction *eo instanti*, and a right of action accrues at once to the covenantee. *McConaughy v. Bennett's Ex'rs*, 50 W. Va. 172 (40 S. E. Rep. 540).

Sec. 73. Breach of warranty—Injunction against grantee's removal of his half of a stone boundary wall. A warranty deed of land, which, by its express terms, and without any restrictions, includes a "stone wall bounding said land on the north" erected as a partition wall under an agreement between the grantor's predecessor in title and the owner of the adjoining land that it should permanently remain, passes to the grantee the absolute title to the south half of such wall and the land under it, and an injunction obtained by such adjoining owner restraining such grantee from removing his half of the wall constitutes a breach of the warranty authorizing the recovery of damages for the depreciation of his use and enjoyment of the property. *Ensign v. Colt*, 75 Conn. 111 (52 Atl. Rep. 829). The court say: "Whether, upon the facts, the plaintiffs in the injunction suit were entitled to have the wall remain upon the land of the present plaintiffs is not a matter to be considered by us. That question was conclusively settled by the judgment in the injunction suit. The inquiry here is whether the right established by that judgment in the adjoining proprietors on the north to have the south half of the wall permanently remain upon land conveyed to the plaintiffs deprived the latter of the enjoyment of a beneficial right to that land granted to them by their deed from the defendant. The defendant has covenanted in her deed to the plaintiffs that the premises are free from all incumbrances whatsoever. Unless it can be said that such outstanding right which has been enforced by a judgment is not an incumbrance upon the land within the meaning of the words, 'all claims and demands whatsoever,' against which by the words of her covenant of warranty the defendant has undertaken to defend the plaintiffs, the judgment of injunction was constructive eviction of the plaintiffs from this portion of the premises conveyed.

It is argued that, since the rights of the two adjoining proprietors in the wall are mutual, the burden of the easement to which the land of each proprietor is subject is balanced by a corresponding benefit, derived from the easement to which it subjects the land of the other proprietor, and that, therefore, the easement to which the plaintiff's land is subjected is not such an incumbrance or claim as will render the defendant liable under her covenant of warranty. The authorities to which we are referred in support of this claim discuss questions arising from the easement which each owner of adjoining house lots has in a party wall for the support of the buildings on his own land. Jones, *Easem.* § 632, defines a party wall as a 'dividing wall between two houses to be used as an exterior wall for each.' In several states the rights of adjoining proprietors in such walls are fixed by statute. The case of *Bertram v. Curtis*, 31 Ia. 46, which holds that a party wall is not an incumbrance, is based upon a statute under which the existence of a party wall would not be an incumbrance, and with reference to the provisions of which it is to be presumed the covenants of the deed were made. In the case of *Mohr v. Parmelee*, 43 N. Y. Supr. Ct. 320, the question of whether a party wall was standing equally upon the land of adjoining proprietors was not raised. The wall in that case stood wholly upon one of the adjoining lots, and the right of the proprietor of the other to use it as a party wall was held to constitute an incumbrance upon the lot on which the wall stood. To the same effect is *Giles v. Dugro*, 1 Duer, 331. The case of *Hendricks v. Stark*, 37 N. Y. 106 (93 Am. Dec. 549), which seems to support the defendant's contention that a party wall is not an incumbrance, was an action to enforce the specific performance of a contract for the purchase of a hotel in the city of New York, which the defendant refused to complete upon the ground that two of the walls of the hotel were party walls supporting buildings on adjoining lots. The court, in deciding that the plaintiff was entitled to recover, held that 'a party wall creating a community of interest between adjoining proprietors is in no just sense to be deemed a legal incumbrance upon the property.' But the court added that, even if this were otherwise, the plaintiffs were entitled to a decree, since after full opportunity of examination the defendant approved of the form of the proposed conveyance, and executed a bond and mortgage for the balance of the purchase price. The basis of the decision in this and other cases cited, that a

party wall is not an incumbrance, seems to be that the lands of the adjoining owners are necessarily equally benefitted and equally burdened by such party wall. But, even as applied to party walls, the correctness of this rule has been denied in actions at law for a breach of the covenants of a deed. *Mackey v. Harmon*, 34 Minn. 168-172 (24 N. W. Rep. 702), cited with approval in *Burr v. Lamaster*, 30 Neb. 688 (46 N. W. Rep. 1015; 9 L. R. A. 637; 27 Am. St. Rep. 428); *Edmunds' Appeal*, Pa. (8 Atl. Rep. 31). In 8 Am. & Eng. Enc. Law, pp. 125, 126, where authorities upon this question are collected, it is stated in the article on covenants that, while it has been said that a party wall standing equally upon the land of adjoining proprietors does not constitute an incumbrance upon the land of either, the law has with reason been declared to be otherwise. In *Mackey v. Harmon*, 34 Minn. 168 (24 N. W. Rep. 702), the court after defining an incumbrance as a right or interest in a third person in land to the diminution of its value (2 Greenl. Ev. § 242), says: 'The existence of the incumbrance does not depend upon the extent or amount of the diminution in value. If the right or interest of the third person is such that the owner of the servient estate has not so complete and absolute an ownership and property in his land as he would have if the right or interest spoken of did not exist, his land is in law diminished in value and incumbered.'

Sec. 74. Breach of covenants—Pleading and practice in action for. In an action on a covenant of seisin the burden is on the plaintiff to show that the grantor had no title at the time of his conveyance. *Wine v. Woods*, 159 Ind. 388 (63 N. E. Rep. 759). In an action for false warranty it is not necessary to allege or prove that the defendant knew of the incumbrance constituting the breach at the time of the warranty. *Piche v. Robins*, 24 R. I. 325 (53 Atl. Rep. 92). In an action for breach of a grantor's special covenant "to warrant and defend the title to the aforesaid described land against the claim or claims of any and all persons claiming through or under us," the complaint must allege that the paramount title to which the plaintiff has been compelled to yield was held by one claiming under the covenantor. *Ravenel v. Ingram*, 131 N. C. 549 (42 S. E. Rep. 967). For particular complaint held to allege sufficient facts to constitute a cause of action for breach of contract of seisin, see *Koepke v. Winterfield*, 116 Wis. 44 (92 N. W. Rep. 437).

Sec. 75. Breach of covenants—Measures of damages.

Where the land conveyed is not all of the same quality or value, the general rule is that the measure of damages for breach of covenant of seisin is such proportion of the entire consideration as the value of the land of which the grantor was not seized bears to the value of the whole premises, with interest; but where the land conveyed is all of the same quality or value, the measure of damages is such proportion of the entire consideration as the quantity of the land lost bears to the whole quantity conveyed, with interest. Whether the land described in the deed is or is not of the same quality or value, if the parties have agreed upon a fixed and uniform price per acre, or per front foot, or any other standard of quantity, the measure of damages is such price multiplied by the quantity of land as to which the covenant fails, with interest. *Conklin v. Hancock*, 67 O. St. 455 (66 N. E. Rep. 518). An evicted covenantee may recover upon the warranty of a remote vendor the sum which the latter received as consideration for the sale of the land, regardless of the amount paid for the land by such covenantee. *Lewis v. Ross*, 95 Tex. 358 (67 S. W. Rep. 405). Citing, *Brooks v. Black*, 68 Miss. 161 (8 So. Rep. 332; 11 L. R. A. 176; 24 Am. St. Rep. 259); *Lowrance v. Robertson*, 10 S. C. 8; *Mischke v. Baughn*, 52 Ia. 528 (3 N. W. Rep. 543); *Dougherty v. Duvall's Ex'rs*, 9 B. Mon. 57; *Cook v. Curtis*, 68 Mich. 611 (36 N. W. Rep. 692). The measure of damages for the breach of a grantor's covenant to remove a particular incumbrance, in an action brought by a grantee who has never been in possession, after the foreclosure of the incumbrance, is the amount of such incumbrance. *Bohlcke v. Buchanan*, 94 Mo. App. 320 (68 S. W. Rep. 92).

CROPS AND EMBLEMENTS.

EPITOME OF CASES.

Sec. 76. Title and right to growing crops. In the absence of a reservation crops growing on the land at the time of its conveyance by deed pass to the grantee. *Gam v. Cordrey*, Del. (53 Atl. Rep. 334). In determining the crop

rights of a tenant under a special contract, evidence is admissible to show a custom or usage of the place, but not to prove the business rules or custom of the lessor. *Thompson v. Exum*, 131 N. C. 111 (42 S. E. Rep. 543). In Nebraska the title to growing crops does not pass to a purchaser at a judicial sale, *Cassell v. Ashley*, (Neb.) 92 N. W. Rep. 1035; but a purchaser at an execution sale is entitled to crops planted after the confirmation of the sale, *Jaques v. Dawes*, (Neb.) 92 N. W. Rep. 570.

Annual crops growing on the land do not pass to the purchaser at judicial sale; and for the purpose of saving the debtor's rights thereto, these annual crops will be regarded as personalty. *Aldrich v. Bank of Ohio*, 64 Neb. 276 (89 N. W. Rep. 772; 57 L. R. A. 920). An announcement by a referee making a partition sale that "there would be a claim against the place of about 28 acres of rye, besides that the one that put in the rye was to take his; he furnished all the seed, and was to take his share of the seed out of the other half," was held not to constitute a reservation of the rye from the sale, but was, at most, a statement that the purchaser would take title to the rye, but subject to some claim. *Banta v. Merchant*, 173 N. Y. 292 (66 N. E. Rep. 13). If a sale of land is made under a deed of trust, and at the time thereof there is an understanding had, concurred in by the purchaser, that a portion of the crop growing on such land is not included in such sale, such purchaser cannot afterwards set up a valid claim to such excluded portion of such crop under such sale. *Hubbs v. Swabacker*, 51 W. Va. 438 (41 S. E. Rep. 164).

Sec. 77. Tenant's right to crops as against purchaser at execution sale. A tenant for cash rental of lands of a judgment debtor, who plants crops thereon which are growing at the time of a subsequent sale of the lands on execution under the judgment, is entitled to the crops at maturity, as against the purchaser at the execution sale. *Johnson v. Cook*, 96 Mo. App. 442 (70 S. W. Rep. 526). The court say: "If the tenant has planted or sown his annual crop, which should mature before the termination of his tenancy, his rights are superior to a judgment or execution creditor who has a lien on the land at the time the crop is sown or planted, who has not foreclosed such lien. A judgment debtor may lawfully make an annual lease of his lands, and if, during such lease, the creditor sells them, the purchaser only gets the interest of the landlord debtor,

and not the interest of the tenant. This rule is founded in the interest of agriculture. The land ought not to lie idle. A tenant occupying such land cannot know what action the coming purchaser may take in reference to his term, and unless he has assurance that his crop, or his interest in the crop, cannot be taken from him, he will refuse to plant. The law gives him such assurance. So, while the sale will change his landlord and the character of his tenancy, it will not divest him of his emblements. He becomes a tenant at will, or from year to year, as the case may be, to the purchaser; and under the law, founded on good agricultural policy, he must have his way-going crops. *Bittinger v. Baker*, 29 Pa. 66 (70 Am. Dec. 154); *McKeeby v. Webster*, 170 Pa. 624 (32 Atl. Rep. 1096); *Dollar v. Roddenberry*, 97 Ga. 148 (25 S. E. Rep. 410); *Heavilon v. Farmers' Bank*, 81 Ind. 249. Counsel state that the point has not been decided in this state. Though this be true, there are two or more cases that bear somewhat upon it. In *Adams v. Leip*, 71 Mo. 597, one who had sown and harvested 1205 shocks of wheat was held to have the property therein as against the owner of the land,—that, too, whether he was a tenant or trespasser against the owner. And in *Edwards v. Eveler*, 84 Mo. App. 405, one who had become the tenant of a party, who had no right to let to him, could hold the crop which he planted and gathered, as against the true owner. The tenant does not owe the judgment creditor of his landlord. His crop is the product of his labor, joined with the use of the land. While the purchaser under the creditor's judgment has a right to compensation for the latter, he has no right to forcibly possess himself of the fruits of the former. Therefore he only gets the landlord's interest by his purchase. *Stockwell v. Phelps*, 34 N. Y. 363 (90 Am. Dec. 710); *Page v. Fowler*, 39 Cal. 416 (2 Am. Rep. 462). In this case the landlord's rent for use of the land was money. He had no part of the crop, and therefore the purchaser took no interest in the crop by his purchase."

CURTESY AND DOWER.

EPITOME OF CASES.

Sec. 78. Curtesy of husband. A tenant by the curtesy in possession has no authority, as such, to represent the reversioner, or to bind him or his estate in any manner whatever. *Learned v. Ogden*, 80 Miss. 769 (32 So. Rep. 278; 92 Am. St. Rep. 621). A tenancy by the curtesy does not exist in lands in which the wife had only an estate in remainder expectant upon a life estate created for the benefit of another, which did not terminate during coverture. *Appeal of Ward*, 75 Conn. 598 (54 Atl. Rep. 730). A husband's expectant estate by curtesy may be destroyed by statute (Ky. Stat., § 2127) enacted before a child is born to him. *Phillips v. Farley*, 112 Ky. 837 (66 S. W. Rep. 1006; 23 Ky. Law Rep. 2201). In New Jersey if a child be born during the coverture, and the husband survives the wife, he will take an estate by the curtesy (complete) in lands whereof she died seized of an estate of inheritance. *Bristol v. Skerry*, 64 N. J. Eq. 624 (54 Atl. Rep. 135). Under N. C. Const., art. 10, § 6, a husband cannot claim curtesy in lands acquired since 1888, which are devised by his wife's will. *Ex parte Watts*, 130 N. C. 237 (41 S. E. Rep. 289). In determining the amount to be awarded a tenant by curtesy who has agreed to take a gross sum in the proceeds of the sale of the realty, in lieu of a life estate, he is not entitled to participate in the value given the land on account of unopened mines; but the value of the timber on the land should not be deducted, where the value of the land is increased by the cutting of such timber. *Bond v. Godsey*, 99 Va. 564 (39 S. E. Rep. 216). In West Virginia, during the wife's life, her husband has no estate by curtesy initiate in her separate real estate which can be subjected to the lien of a judgment against him. *Guernsey v. Lazear*, 51 W. Va. 328 (41 S. E. Rep. 405). For discussion of nature of estate by curtesy, see *Turner v. Heinberg*, 30 Ind. App. 615 (65 N. E. Rep. 294).

Sec. 79. Right to dower—Nature of estate. Although an inchoate right of dower is not an estate, but only a right of action, still it is in the nature of a lien upon real estate, and is treated as an incumbrance to be protected. *Atwood v. Arnold*, 23 R. I. 609 (51 Atl. Rep. 216). Citing, *Davis v. Wetherell*, 13 Allen, 60 (90 Am. Dec. 177); *Gatewood v. Gatewood*, 75 Va. 407; *Campbell v. Ellwanger*, 81 Hun, 259 (30 N. Y. Supp. 792); *Frisbee v. Frisbee*, 86 Me. 444 (29 Atl. Rep. 1115); *Vaughan v. Dowden*, 126 Ind. 406 (26 N. E. Rep. 74); *Smith v. Hall*, 67 N. H. 200 (30 Atl. Rep. 409). A wife's inchoate right to dower, during the life of her husband, may be changed or abolished by the legislature. *Helm v. Board*, Ky. (70 S. W. Rep. 679; 24 Ky. Law Rep. 1037). Under the express provision of Mo. Rev. Stat. 1899, § 2934, a widow's right to unassigned dower is alienable. *Phillips v. Presson*, 172 Mo. 24 (72 S. W. Rep. 501); *Cassity v. Pound*, 167 Mo. 605 (67 S. W. Rep. 283). Applying Va. Code, § 2222, providing that "every marriage in this state shall be under a license and solemnized in the manner herein provided," it is held that a widow cannot claim dower in the lands of one deceased with whom she claimed a marriage without any license or celebration. *Offield v. Davis*, 100 Va. 250 (40 S. E. Rep. 910). A dowress becomes seised for life of a freehold estate in the tract of land assigned to her as and for dower, and this estate for life does not depend on the continued occupancy by the dowress, but it may be aliened as any other estate for life. *Rowley v. Poppenhager*, 203 Ill. 434 (67 N. E. Rep. 975). In Maine the owner of a parcel of real estate subject to an assignment of dower in "the sum of two hundred dollars, to be paid annually from the rents and profits of that parcel," cannot maintain a bill in equity to have the real estate sold free of the widow's dower, and the present worth of the widow's annuity appraised, and paid to her out of the proceeds. *Haugh v. Pierce*, 97 Me. 281 (54 Atl. Rep. 727). A widow's right to dower is subordinate to a vendor's lien for purchase money. *Helm v. Board*, Ky. (70 S. W. Rep. 679; 24 Ky. Law Rep. 1037).

Sec. 80. Lands subject to dower—Statutes construed. Dower cannot be claimed in lands held by a husband in trust for another. *Britten v. Dickerson*, 202 Ill. 372 (66 N. E. Rep. 1090). A widow may claim dower in land conveyed after her husband's death to his estate in exchange for dowable

land of which he died seized. *De Witt v. De Witt*, 202 Pa. St. 255 (51 Atl. Rep. 987). A widow cannot claim dower in lands in which her husband had at no period during coverture any other estate than a reversion or remainder in fee, expectant upon the determination of an estate for life. *Sammis v. Sammis*, 23 R. I. 499 (51 Atl. Rep. 105). An equitable estate of inheritance in which his wife may claim dower is retained by a husband in land conveyed by their deed to another and her heirs in trust, to permit the husband to possess and enjoy the same and receive the rents and profits, and to convey in fee to any person at the husband's request in writing, and, if not conveyed during the husband's life, to convey to his appointee by will, and in default of appointment to his heirs. *Goodheart v. Goodheart*, 63 N. J. Eq. 746 (53 Atl. Rep. 135). The widow of a deceased partner is only entitled to dower in his share of any real estate of the firm not required by the payment of the firm debts and the adjusting of equitable claims as between the partners themselves. *Davidson v. Richmond*, (Ky.) 69 S. W. Rep. 794 (24 Ky. Law Rep. 699). Citing, *Campbell v. Campbell*, 30 N. J. Eq. 415; *Uhler v. Semple*, 20 N. J. Eq. 288; *Buchan v. Sumner*, 2 Barb. Ch. 165 (47 Am. Dec. 305); *Shearer v. Shearer*, 98 Mass. 107; *Foster's Appeal*, 74 Pa. 391 (15 Am. Rep. 553); *Galbraith v. Tracy*, 153 Ill. 54 (38 N. E. Rep. 937; 28 L. R. A. 129; 46 Am. St. Rep. 867); *Holton v. Guinn*, (C. C.) 65 Fed. Rep. 450. Applying Ky. Stat., § 2142, providing that "if the husband held land by executory contract only, the wife shall not be endowed of the land, unless he owned such equitable right at his death," it is held that a wife cannot claim dower in lands held by a husband under a title bond, but which he had sold and conveyed to another before his death. *Smallridge v. Hazlett*, 112 Ky. 843 (66 S. W. Rep. 1043; 23 Ky. Law Rep. 2228). A mortgage is a deed, within Ky. Stat. § 2135, providing that a wife shall not be endowed of land sold to satisfy a lien or incumbrance created by deed in which she joined. *Morgan v. Wickliffe*, Ky. (72 S. W. Rep. 1122; 24 Ky. Law Rep. 2104). Where the whole of a husband's real estate is sold to satisfy liens prior to the wife's dower right, her dower claim is only operative against the surplus proceeds. Ky. Stat., § 2135, construed and applied. *Helm v. Board*, Ky. (70 S. W. Rep. 679; 24 Ky. Law Rep. 1037). In Rhode Island a widow is entitled to dower in the full value of mortgaged real estate regardless of the fact

that the mortgage is paid by a sale of the land, in the absence of personal property. *Mowry v. Mowry*, 24 R. I. 565 (54 Atl. Rep. 383). Where, at the time a husband purchased a tract of land assuming a mortgage thereon, he took a deed for the land and gave a new mortgage to the holder of the original mortgage which was marked "Satisfied," he acquired no such seisin as gave his wife dower as against the mortgage lien. *Groce v. Ponder*, 63 S. C. 162 (41 S. E. Rep. 83). Va. Code, § 2269, construed and applied—wife's dower rights in incumbered real estate. *Land v. Shipp*, 100 Va. 337 (41 S. E. Rep. 742); *Hoy v. Varner*, 100 Va. 600 (42 S. E. Rep. 690).

Sec. 81. Release or loss of dower. Until the death of her husband a wife has no means of assailing a conveyance of her husband's land purporting to convey a release of her dower and which she never signed, and laches cannot be implied to her. *Hunt v. Rielly*, 23 R. I. 471 (50 Atl. Rep. 833). A wife who has obtained in another state a decree of divorce in an action to which her husband was personally served, but did not appear, is barred by such decree from claiming dower in lands subsequently acquired by him. *Starbuck v. Starbuck*, 173 N. Y. 503 (66 N. E. Rep. 193; 93 Am. St. Rep. 631). A wife's right to claim dower is not released by a contract of separation which does not so expressly stipulate, although by its terms she forever discharges her husband, his heirs and executors, from any claims and demands in law and equity. *Moon v. Bruce*, 63 S. C. 126 (40 S. E. Rep. 1030). The joint possession of an heir or his grantee with a widow, of lands in which she has a right of dower, is not adverse to her and will not bar such right. *Brumback v. Brumback*, 198 Ill. 66 (64 N. E. Rep. 741). In Illinois, where a wife joins her husband in a deed by signing it, it will operate as a valid relinquishment of her dower, although the body of the deed does not describe her as grantor, or name her or her dower. *Chicago & N. W. Ry. Co. v. City of Morrison*, 195 Ill. 271 (63 N. E. Rep. 96). Under Ky. Stat., § 2133, the adultery of a wife does not bar her right to dower where she continues to live with her husband. *Sergeant v. North Cumberland Mfg. Co.*, 112 Ky. 888 (66 S. W. Rep. 1036; 23 Ky. Law Rep. 2226). In New Jersey the wife bars her dower not by any words of release in a deed, but by executing and acknowledging according to law the conveyance of her husband; such acknowledgment being duly certified by the officer taking the same. *Goodheart v. Goodheart*, 63 N. J. Eq. 746 (53 Atl.

Rep. 135). A sale of land at the suit of a judgment creditor of the husband, brought to marshal liens, does not have the effect to bar or foreclose the inchoate dower of the wife. The rule is not different although the wife is made a party to the creditor's suit, and is in default of answer when the judgment ordering a sale is entered and the sale is made, and although a mortgagee, in whose mortgage the wife had joined releasing dower, is also made defendant, but is in default at the time the judgment is rendered and the sale is made. *Jewett v. Feldheiser*, 68 O. St. 523 (67 N. E. Rep. 1072). N. C. Code § 2102, Laws 1893, ch. 153, construed and applied—wife's forfeiture of dower by adultery. *Phillips v. Wiseman*, 131 N. C. 402 (42 S. E. Rep. 861). Applying W. Va. Code, ch. 64 § 6; ch. 65, § 7, it is held that a wife abandoning her husband on account of his having become a habitual drunkard after their marriage, will not be thereby barred of her dower in his estate. *Stuart v. Neely*, 50 W. Va. 508 (40 S. E. Rep. 441).

Sec. 82. Jointure. Under Hurd's Ill. Rev. Stat. 1899, ch. 41, § 9, p. 658, a wife to whom lands have been conveyed by her husband in pursuance of a contract between them that she was to take the same in lieu of all her marital rights in his property, cannot retain such land and also claim dower; and such a contract bars her dower, not only in the realty owned by her husband at the time of the agreement, but in all his after-acquired land. *Heiser v. Sutter*, 195 Ill. 378 (63 N. E. Rep. 269). In order for a woman to bar her dower, under Mo. Rev. Stat. 1899, § 2950, by receiving any estate before her marriage, under an agreement that it is to be in lieu of dower, the instrument conveying such estate must show on its face that it is in lieu of dower. *Rice v. Waddill*, 168 Mo. 99 (67 S. W. Rep. 605). For further construction of this statute, including §§ 2951-2953, see *Leavy v. Cook*, 171 Mo. 292 (71 S. W. Rep. 182); *Moran v. Stewart*, 173 Mo. 207 (73 S. W. Rep. 177).

Sec. 83. Assignment of dower. Under Hurd's Ill. Rev. Stat., ch. 41, § 36, one of several lots in which a widow has a dower interest may be allotted to her in satisfaction of such interest. *Rowley v. Poppenhager*, 203 Ill. 434 (67 N. E. Rep. 975). Applying Hurd's Ill. Rev. Stat. 1899, p. 661, providing that "dower need not be assigned in each tract separately, but may be allotted in a body out of one or more of the tracts of land, when the same can be done without prejudice to the in-

terest of any person interested in the premises," it is held that a son to whom a deceased husband has conveyed a tract of land by warranty deed, to be in full of his share of the grantor's estate, is entitled to have the widow's dower assigned out of other land. *Longshore v. Longshore*, 200 Ill. 470 (65 N. E. Rep. 1081). Mo. Rev. Stat. 1889, § 5440 construed and applied—duty of commissioners appointed to set out homestead to widow entitled to dower. *Cassity v. Pound*, 157 Mo. 605 (67 S. W. Rep. 283). Va. Code, § 2278 construed and applied—election by alienee of land to pay widow interest on one-third of its value—right to have dower assigned upon his default. *Dickenson v. Gray*, 100 Va. 526 (42 S. E. Rep. 298). Where, in partition proceedings between minor and adult heirs of an intestate, his widow is made a party and asks for an assignment of her dower, it should be allotted before the sale. *Seaman v. Seaman*, 129 N. C. 293 (40 S. E. Rep. 41). Heirs sued by a widow to recover certain monthly payments allotted to her as part of her dower and made a charge on certain property, cannot set up as a defense a claim for damages for waste committed by her on premises allotted to her as dower. *Hybart v. Jones*, 130 N. C. 227 (41 S. E. Rep. 293).

DANGEROUS PREMISES.

EPITOME OF CASES.

Sec. 84. Liability of an agricultural society for accident resulting from a shooting gallery operated on its grounds. An agricultural society letting space on its fair grounds for a shooting gallery is liable for the death of one occasioned by a bullet of a patron of the gallery missing the target, although the deceased at the time of the injury was standing on a railroad platform outside of the grounds, it appearing that such platform was one of the approaches to the grounds, and within the scope of the society's invitation to the public to attend the fair. *Thornton v. Maine State Agricultural Soc.*, 97 Me. 108 (53 Atl. Rep. 979; 94 Am. St. Rep. 488). The court say: "The defendant was giving a

great exhibition, to which the public, far and near, were invited. The fair to which the public were invited consisted not only of the racing of horses, and of the exhibition of live stock and agricultural and manufactured products and machinery or implements, which it may be supposed were more directly the objects of the society in holding the fair, but also of all the shows, exhibits, and attractions of all kinds recognized by the defendant, and permitted by it to have space upon its grounds. The fair was undoubtedly intended to be, in the matter of attractiveness, all things to all men. Some visitors would be attracted by one feature, others by another. All of these attractions tended to draw visitors to the fair, and to increase the income of the defendant, which took gate money from all. These attractions, no less than the defendant's own exhibits, constituted a part of the fair to which the public were invited.

It is too well settled to need the citation of authorities that, if the owner or occupier of land either directly or by implication induce persons to come upon his premises, he thereby assumes an obligation to see that such premises are in a reasonably safe condition, so that the persons there by his invitation may not be injured by them or in their use for the purpose for which the invitation was extended.

Therefore, having invited the public to its fair, it was the duty of the defendant to use reasonable care to keep its grounds, and the usual approaches to them, so far as the approaches were under its control, in a safe condition,—safe for all who were invited. It was its duty to use reasonable care that there should be no traps or pitfalls into which the invited might fall, and that there should be no dangerous plays or sports or exhibits by which the invited might be injured. In short, to reach this case, it was its duty to use reasonable care that there should be no firing of dangerous firearms upon its grounds, so as to jeopardize the life or limb of any of those whom it had invited to its fair, whether they were at the time within the grounds, or properly within the usual approaches to the grounds,—as, for instance, upon the railroad platform.

The defendant would not be relieved from the duty by leasing portions of its grounds to the proprietors of shows and attractions and becoming their landlord. As between it and the invited public, the duty still remained of using reasonable care to see that all of the exhibition grounds were safe.

It was its duty so to do both in the original letting of space, and in the subsequent inspection and supervision of the show thus permitted to give its exhibition, or of the shooting gallery thus permitted to operate as a part of the fair. And this duty would be particularly strong and urgent in case of an exhibition or sport which might, unless properly conducted, be attended with danger, such as the use of firearms.

These views are well supported by authority. The court in *Sebeck v. Plattdeutsche Volkfest Verein*, 64 N. J. L. 624 (46 Atl. Rep. 631; 81 Am. St. Rep. 512; 50 L. R. A. 199), speaking of the duties of the proprietor of a park to which the public had been invited, and for entering which an admission fee was charged, said: 'Having invited the public to its park, it was chargeable with the duty of using reasonable care to see that the premises were kept in a safe condition for the use of its guests; and if the exhibition, although given by an independent contractor, was of a character to jeopardize the safety of those who were present on the defendant's invitation, the duty was cast on the latter of taking due precautions to guard against injury.' *Hart v. Washington Park Club*, 157 Ill. 9 (41 N. E. Rep. 620; 48 Am. St. Rep. 298; 29 L. R. A. 492); *Dunn v. Society*, 46 O. St. 93 (18 N. E. Rep. 496; 15 Am. St. Rep. 556; 1 L. R. A. 754); *Lane v. Society*, 62 Minn. 175 (64 N. W. Rep. 382; 29 L. R. A. 708); *Schofield v. Wood*, 170 Mass. 415 (49 N. E. Rep. 636); *Mastad v. Swedish Brethren*, 83 Minn. 40 (85 N. W. Rep. 913; 85 Am. St. Rep. 446); *Herrick v. Wixom*, 121 Mich. 384 (80 N. W. Rep. 117; 81 N. W. Rep. 333); *Windeler v. Association* 27 Ind. App. 93 (59 N. E. Rep. 209); *Fox v. Buffalo Park*, 21 App. Div. 321 (47 N. Y. Supp. 788), affirmed in 163 N. Y. 559 (57 N. E. Rep. 1109). In *Railway Co. v. Moore*, 94 Va. 493 (27 S. E. Rep. 70; 37 L. R. A. 258), the court held 'that the fact that a balloon ascension in a park owned by a street car company, to which the public were invited, is given by an independent contractor, did not relieve the owner of the park from liability for failure to use due care that persons visiting it should not be injured by the dangerous character of the apparatus connected with the inflation of the balloon.' In *Thompson v. Railway Co.*, 170 Mass. 577 (49 N. E. Rep. 913; 64 Am. St. Rep. 323; 40 L. R. A. 345), it was held that the fact that an exhibition' given at grounds provided by the defendant, a street car company, for the free entertainment of its patrons, 'was provided and conducted by an independent

contractor, would not wholly relieve the defendant from responsibility, provided it was of such a kind that it would probably cause injury to a spectator, unless due precautions were taken to guard against harm.' *Conradt v. Clauve*, 93 Ind. 476 (47 Am. Rep. 388), was a case very much like the one at bar. The defendants, who were the proprietors and managers of a public fair, had allotted part of the grounds for practice in shooting with a target gun. The plaintiff was a patron of the fair, and his horse, hitched near the ground allotted for target shooting, was killed by a ball fired from the target gun. The court, in affirming judgment for the plaintiff, said: 'The practice in target shooting appears to have been a part of the entertainment carried on at the fair, and as the defendants were the owners of the premises, and the managers and controllers of the fair, the practice in target shooting was a part of their exhibition, and under their supervision and control as much as any other part of the fair. And those having charge of the practice, as well as those engaged in it, while perhaps not strictly agents or servants of the defendants, were acting under the license and permission of the defendants; and such a relation existed between them as will hold the defendants liable for injuries resulting from their negligence in not properly controlling the conduct and management of this part of their exhibition.'

Some of the cases cited are those where the injury resulted from the negligence of independent contractors, and not lessees. But we can perceive no tenable distinction in a case like this. In either case the offending thing is where it is by the license and permission of the owners of the premises, and upon ground which the owners, by virtue of their invitation to the public, hold out as safe. This is the ground of their liability. By inviting patrons to their fair, they make themselves bound to use reasonable care to see that the fair is in all its parts safe, and is conducted safely, whether the various parts of the fair are conducted and managed by the owners themselves, or, with their permission, by licensees, independent contractors, or lessees. Such is the conclusion which rests upon good sense, and which seems to be clearly established by all the authorities upon the subject."

Sec. 85. Liability of owner—Injury to persons invited onto his premises. Where the owner or occupier of lands, by express invitation, induces a person to make use of a por-

tion of the premises for an expressed purpose, his liability is confined within the limits of the invitation, and does not extend to injuries received by the person invited while using the premises for a purpose not expressed, and not authorized by the invitation. *Ryerson v. Bathgate*, 67 N. J. L. 337 (51 Atl. Rep. 708). See opinion for application of this rule to a peculiar state of facts. As to one invited on his premises, an owner is required to use reasonable care to have them in a safe condition, but the only duty he owes to a mere licensee is to refrain from acts willfully injurious. *Land v. Fitzgerald*, 68 N. J. L. 28 (52 Atl. Rep. 229). The owner of platform scales is charged with the duty to persons who, by his invitation, use them to inspect and keep such scales in a reasonably safe condition. *McIntyre v. Detroit Safe Co.*, 129 Mich. 385 (89 N. W. Rep. 39). If a contractor goes upon the premises of another to perform a contract to do work for the owner, and is injured from defect in the premises known, or which by fair care ought to be known, to the owner, and unknown, or which by fair care can not be known, to such contractor, the owner is liable; but, under the reverse of these circumstance, he is not liable. *Sesler v. Rolfe Coal & Coke Co.*, 51 W. Va. 318 (41 S. E. Rep. 216). Citing, *Thompson's Commentaries on Negligence*, (2d Ed.) Vol. 1, § 979; *Bennett v. Railroad Co.*, 102 U. S. 577 (26 L. Ed. 235); *Samuelson v. Mining Co.*, 49 Mich. 164 (43 Am. Rep. 456); *Bright v. Barnett & Record Co.*, 88 Wis. 299 (60 N. W. Rep. 418; 26 L. R. A. 524, note). An owner of a building is liable to one engaged by him to make repairs thereon, resulting from his falling through an unguarded hatchway of which he had no knowledge nearby a common passway in the building, the place being insufficiently lighted. *Barowski v. Schultz*, 112 Wis. 415 (88 N. W. Rep. 236). A merchant maintaining an open elevator shaft in the back part of his store near an alley door owes to a customer entering by such door the duty of protecting him from the unsafe condition of the room, although customers are not expressly or impliedly invited to use such entrance. *Burk v. Walsh*, 118 Ia. 397 (92 N. W. Rep. 65).

Sec. 86. Liability of owner—Particular cases. A servant of the owner of a building who has used a stairway therein for several months cannot recover for an injury incurred by falling down the stairway on account of the steep-

ness of the steps, though the injury was occasioned by his hastening to answer a telephone call supposed to be urgent. *Mann v Moore*, (Ky.) 68 S. W. Rep. 402 (24 Ky. Law Rep. 253). The construction of the floor of an office at the elevation of $4\frac{7}{8}$ inches above the floor of the adjoining hallway is not of itself so defective or negligent as to render the owner of the building liable for an injury resulting to a licensee on account of such elevation. *Ware v. Evangelical Baptist Benev. & Miss. Soc.*, 181 Mass. 285 (63 N. E. Rep. 885). Where a railroad company erects a sufficient obstruction in a passway permissively used by the public across its right of way, clearly to indicate that the permission is withdrawn, and maintains the same for a period of three months, persons afterward using the way are trespassers and cannot recover for injury resulting to them on account of the obstruction not being maintained in its original state. *Illinois Cent. R. Co. v. Waldrop*, (Ky.) 72 S. W. Rep. 1116 (24 Ky. Law Rep. 2127). The owner of a building which has been damaged by fire, who delivers the same to an independent contractor for the purpose of repairing it generally and putting it in thorough order, and who surrenders to the latter full possession and complete control of the premises, is not, merely because of the peculiar arrangement of some of the appointments of the building, such as an elevator shaft, stairways, etc., which, under certain conditions, may become sources of hidden danger to one unfamiliar with their location, liable to any person going into the building by invitation of the contractor for damages resulting from physical injuries sustained because of exposure to such danger. *Butler v. Lewman*, 115 Ga. 752 (42 S. E. Rep. 98).

A city erecting a pest house in violation of a statute (Ky. Stat. §3909) prohibiting its erection within one mile of the city limits, is liable to one injured by contracting smallpox while visiting a nearby family into which the disease had been introduced by reason of the pest house. *City of Henderson v. O'Halaran*, Ky. (70 S. W. Rep. 662; 59 L. R. A. 718; 24 Ky. Law Rep. 995). But a complaint by the owner of a fruit and vegetable garden near which a city maintains a pest house in violation of this statute, which demands damages on account of the pest house preventing his getting hands to cultivate, gather or market his vegetables and fruits, and secluding himself and family from communication from other persons, is insufficient where it fails to allege that the fears of third persons which cause such conditions were well founded.

McKay v. City of Henderson, (Ky.) 71 S. W. Rep. 625 (24 Ky. Law Rep. 1484).

Sec. 87. Liability of owner for injury to tenant—General principles. The relation of lessor and lessee arises out of contract, and, where there is neither express warranty nor deceit, the latter can not maintain an action against the former on account of the condition of the premises hired. *Shinkle, Wilson & Kreis Co. v. Birney & Seymour*, 68 O. St. 328 (67 N. E. Rep. 715). There is no implied duty on the owner of a house which is in an unsafe condition to inform a proposed tenant it is in a dangerous condition, and no action will lie against him for an omission to do so, in the absence of express warranty or deceit. *Land v. Fitzgerald*, 68 N. J. L. 28 (52 Atl. Rep. 229). One letting premises without knowledge of their defective condition and who makes no covenant to repair is not liable to his tenant for injury resulting from their defective condition. *Roehrs v. Timmons*, 28 Ind. App. 578 (63 N. E. Rep. 481). Where the landlord assumes the responsibility of replacing a board in the floor of a leased building, broken by one of his workmen otherwise engaged on the premises, he is liable for injuries resulting to his tenant from his failure to repair the defect. *Aldag v. Ott*, 28 Ind. App. 542 (63 N. E. Rep. 480). A landlord who maintains defective and leaking gas pipes running through portions of his premises, which he has leased to others, for supplying with gas other parts of the premises occupied by him, is liable for injury to his tenant who was without fault, for an explosion resulting from such leakage. *Indianapolis Abattoir Co. v. Temperly*, 159 Ind. 651 (64 N. E. Rep. 906; 95 Am. St. Rep. 330). The mere failure of a landlord to make repairs, which he has agreed to make, cannot make him responsible to the tenant, or a member of his family, for damages for personal injuries sustained by reason of the defective condition of the premises, whether such be in *assumpsit* or in case, but, in order to recover such damages, there must be shown some clear act of negligence or misfeasance on the part of the landlord, beyond the mere breach of contract. Nor does liability arise on account of the lessor's failure to comply with his agreement to fix particular defects pointed out by the lessee, where the injury resulted from other defects not then known to either of them. *Thompson v. Clemens*, 96 Md. 196 (53 Atl. Rep. 919; 60 L. R. A. 580). See opinion for exhaustive discussion of this subject. In the case of *Patterson*

v. Jos. Schlitz Brewing Co., S. Dak. (91 N. W. Rep. 336), the supreme court of South Dakota conclude an opinion discussing various phases of the subject by saying: "With reference to the liability of the owner for injuries to persons caused by defective and unsafe buildings, the following rule may be regarded as settled: If when let the premises are in a condition dangerous to the public, or with a nuisance thereon, the owner may be liable to strangers for the injuries resulting from such condition or nuisance if he had notice of the dangerous condition of the building, or could, by the exercise of ordinary care and diligence, have ascertained its dangerous condition. By renting the premises and receiving rent therefor he is to be regarded as authorizing the continuance of the nuisance."

Sec. 88. Liability of owner for injury to tenant resulting from concealed defects. A landlord, who in response to a prospective tenant's inquiry represents to him that the premises proposed to be leased are free from sewer gas when he knows they are not, is liable to the tenant who was ignorant of the true condition of the premises for injuries resulting to him or to his family from escaping sewer gas. *Sunasack v. Morey*, 196 Ill. 569 (63 N. E. Rep. 1039). The court say: "The law is well settled that the rule of caveat emptor applies to a contract of letting, and the landlord is not bound to make repairs unless he has assumed such duty by express agreement with the tenant. The tenant takes the premises as he finds them, subject to his own risk, and there is no implied covenant on the part of the landlord that they are fit for habitation, or fit for the purposes for which they are rented, or that they are in any particular condition. The landlord is therefore not liable for damages resulting to the tenant by reason of the demised premises being out of repair, unless he has expressly bound himself to make repairs by the terms of the contract to let. Where, however, there are concealed defects in the demised premises, attended with danger to an occupant, which a careful examination would not disclose, but which are known to the landlord, the latter is under obligation, imposed upon him by law, to reveal them to the tenant, in order that he may guard against them; and, upon the landlord's failure to perform such duty he will become liable for whatever damages actually result to the tenant therefrom. 1 *Thomp. Neg.* §§ 1129, 1131; 18 *Am. & Eng. Enc. Law.* (2d Ed.) p. 224; 2 *Wood, Landl.*

& Ten. § 381. In *Cowen v. Sunderland*, 145 Mass. 363 (14 N. E. Rep. 117; 1 Am. St. Rep. 469), it is said (page 364, 145 Mass., page 118, 14 N. E. Rep., and page 469, 1 Am. St. Rep.): 'When there are concealed defects, attended with danger to an occupant, and which a careful examination would not discover, known to the lessor, the latter is bound to reveal them, in order that the lessee may guard against them. While the failure to reveal such facts may not be actual fraud or misrepresentation, it is such negligence as may lay the foundation of an action against the lessor if injury occurs.' In *Anderson v. Hayes*, 101 Wis. 538 (77 N. W. Rep. 891; 70 Am. St. Rep. 930), the court say (page 543, 101 Wis., page 892, 77 N. W. Rep., and page 930, 70 Am. St. Rep.): 'The principle is well settled that a tenant takes leased premises in the condition in which they happen to be when leased, and that the landlord is not liable to the tenant for injuries resulting from lack of repair unless he has contracted to repair, or unless the defect be a concealed one, known to the landlord, and not disclosed to the tenant, and not discoverable by the use of that degree of care which the law demands.' In *Coke v. Gutkese*, 80 Ky. 598 (44 Am. Rep. 499), the defendant let a house to the father of plaintiff, knowing that the timbers of the privy vault were rotten and unsafe, but concealed that fact from the tenant. The timbers gave way, and the plaintiff was precipitated into the vault and greatly injured. The court say: 'Although the law presumes that it was her father's duty to repair the premises, in the absence of an agreement otherwise, still we are of the opinion that if the appellee rented the premises, knowing that the privy was in the condition alleged, it was his duty to disclose his knowledge, because it was a portion of the premises which he knew, as all men know, would be in daily use by his tenant and family, and, unless apprised of the hidden danger, they would inevitably be injured, and the younger and more helpless perhaps lose their lives.' In *Moore v. Parker*, 63 Kan. 52 (64 Pac. 975; 53 L. R. A. 778), the plaintiff and her husband were occupying a farm rented of the defendants. While the plaintiff was about her household duties upon said premises, drawing water from a well used for domestic purposes, and located at the residence, the platform around the well gave way, precipitating her into the well, from which she sustained personal injuries. The defendants had notice of the defective condition of the well, but failed to notify plaintiff or her hus-

band of such defect. The court say: 'A landlord is not an insurer or a warrantor, nor is he compelled to exercise constant care and inspection; but if he knows that the premises which he is about to let are in a dangerous condition, and especially if such danger or defect is not obvious, or is not discoverable by the tenant by the exercise of ordinary care, and does not inform him of such danger, and injury is occasioned thereby to the tenant or a member of his family, the landlord is liable in damages.' In *Kern v. Myll*, 80 Mich. 525 (45 N. W. Rep. 587; 8 L. R. A. 682), the trial court directed a verdict for the defendant on the ground that the plaintiff's declaration did not disclose a cause of action. The judgment was reversed and a new trial ordered. The court say (page 530, 80 Mich., page 588, 45 N. W. Rep., and page 682, 8 L. R. A.): 'The cause alleged does not rest upon any covenant, express or implied, of the landlord to repair the premises, nor that they were habitable at the time the lease was made, nor does it rest necessarily upon the relation of landlord and tenant, although the lease is set up by way of inducement, to show the right of the plaintiff to possession of the premises; but the cause of action is based upon the maxim that every person must so use his own premises as not to injure others, either in person or property, rightfully in the vicinity. The declaration sets up the construction and continuance of a nuisance by the defendant upon his own land, to the injury of the plaintiff, the existence and cause of which were unknown to the plaintiff, and were known to, but were concealed from him by, defendant. It discloses a cause of action in tort, resting upon the duty of the defendant to disclose to the plaintiff defects in the premises amounting to nuisances, known to defendant and concealed from plaintiff, which were calculated to impair, and did impair, the health of the plaintiff.' In *Snyder v. Gorden*, 46 Hun, 538, it was held, if the tenant learns, before taking the lease, that a contagious disease has been in the house, and, upon asking the landlord about it, is informed that the report is untrue, he has a right to rely upon the landlord's statement, and need not take further precautions to ascertain as to the fact."

Sec. 89. Liability of owner for injuries resulting from defects in portions controlled by him, of premises leased to several tenants. The owner of an apartment house, who rents the apartments and retains control of the common stair-

ways, is liable for injuries to a member of a tenant's family caused by a stair railing which was defectively constructed, or had been negligently permitted to become out of repair. *McGinley v. Alliance Trust Co.*, 168 Mo. 257 (66 S. W. Rep. 153; 56 L. R. A. 334). Where portions of a tenement building are let to tenants, and the landlord retains the exclusive possession and control of other portions, he is bound to exercise common care and prudence in the management and oversight of the portion of the building retained; and, if damages are sustained by a tenant, by reason of his failure to do so, the landlord is liable therefor. *Kneeland v. Beare*, 11 N. Dak. 233 (91 N. W. Rep. 56). The court say: "The obligation rested upon the defendant to keep the roof, the possession of which was retained by him, in proper repair and condition, so that his tenants would not, through his fault or neglect, be damaged or injured in their persons or goods. In this case, as in *Toole v. Beckett*, 67 Me. 545 (24 Am. Rep. 54)—a case very similar to the case at bar,—the tenants had no right to interfere with the roof, or control of it. 'The defendant had such care and control for the benefit of himself and all his tenants,' and, as said by the court in that case, by implication he undertook so to exercise his control as to inflict no injury upon his tenants. 'If the landlord does not exercise common care and prudence in the management and oversight of that portion of the building which belongs to his special supervision and care, and damages are sustained by a tenant on that account, he becomes liable for them. He is responsible for his negligence. *Priest v. Nichols*, 116 Mass. 401; *Kirby v. Association*, 14 Gray, 249 (74 Am. Dec. 682); *Gray v. Gaslight Co.*, 114 Mass. 149 (19 Am. Rep. 324); *Norcross v. Thoms*, 51 Me. 503 (81 Am. Dec. 588).' In support of the foregoing rule of liability, see *Glickauf v. Maurer*, 75 Ill. 289 (20 Am. Rep. 238); *Inhabitants of Milford v. Holbrook*, 9 Allen, 17 (85 Am. Dec. 735); *Shipley v. Fifty Associates*, 106 Mass. 194 (8 Am. Rep. 318). As to portions of the building of which the landlord has the control, he retains all the responsibilities of a general owner to all persons, including the tenants of the building. *Looney v. McLean*, 129 Mass. 33 (37 Am. Rep. 295). See, also, to the same effect, *Friedenburg v. Jones*, 63 Ga. 612; *Jones v. Freidenburg*, 66 Ga. 505 (42 Am. Rep. 86); 2 Wood, Landl. & Ten. 843; 2 McAdam, Landl. & Ten. 1234; 2 Shear. & R. Neg. § 710."

Sec. 90. Liability of lessor of public toboggan slide for defects in its construction. A lessor of a public toboggan slide is liable for injuries resulting to one lawfully using it on account of its defective construction. *Barrett v. Lake Ontario Beach Imp. Co.*, 174 N. Y. 310 (66 N. E. Rep. 968; 61 L. R. A. 829). The court say: "While, as a general rule, a lessor, in the absence of any agreement or of fraud, is not liable to the lessee for the condition or tenantable use of premises demised—*Sutton v. Temple*, 12 M. & W. 52; *Jaffe v. Harteau*, 56 N. Y. 398 (15 Am. Rep. 438),—that rule is subject to exceptions. If the premises which are rented are in such a dangerous condition as to constitute a nuisance at the time of the renting, the lessor remains liable for the consequences of the nuisance, notwithstanding that his lessee may also be liable. *Swords v. Edgar*, 59 N. Y. 28 (17 Am. Rep. 295). If the premises are rented for a public use for which he knows that they are unfit and dangerous, he is guilty of negligence, and may become responsible to persons suffering injury while rightfully using them. Such instances would be where he lets a warehouse so imperfectly constructed that the floors will not support the weight necessarily upon them; or where he lets a building for public amusements, or exhibitions, or other public purposes, and its construction is so unsafe, structurally, as to be the cause of injury to any one. *Francis v. Cockrell*, L. R. 5 Q. B. 184, 501; *Fox v. Buffalo Park*, 21 App. Div. 321 (47 N. Y. Supp. 788, affirmed 163 N. Y. 559; 57 N. E. Rep. 1109); *Edwards v. N. Y. C. & H. R. R. Co.*, 98 N. Y. 245 (50 Am. Rep. 659). This liability for injuries, attributable to the unfit condition of premises, which have been let for a specific purpose, rests upon negligence; that is to say, upon the omission of a duty to use due care in their erection or construction. The law holds the lessor responsible, not upon any contractual obligation, but because of the delictum."

Sec. 91. Liability of executor or lessee. Executors having the care, control and possession of real property under a trust devise may be sued in tort, as individuals, for injuries resulting from their permitting the premises to remain in a dangerous condition. *O'Malley v. Gerth*, 67 N. J. L. 610 (52 Atl. Rep. 563). The guest of a lessee of a hall for lodge purposes injured by reason of an insufficient lighting of an entrance thereto cannot recover from the lessor where the lessee

had no cause of action against him for such insufficiency of lighting. *Jordan v. Sullivan*, 181 Mass. 348 (63 N. E. Rep. 909). The liability of one leasing for a public ceremony a building constructed and used for such purposes, for an injury resulting from the defective construction or maintenance thereof, is limited to such defects as an inspection would have disclosed. *Eckman v. Atlantic Lodge*, 68 N. J. L. 10 (52 Atl. Rep. 293).

Sec. 92. Fall of buildings or other structures. The owner of the walls of a building which remain standing after its destruction by fire, in such close proximity to a street as to be dangerous to passers-by, is not relieved from liability for injuries resulting to such from the walls falling, by reason of the fact that he had directed competent architects and builders to do what was necessary to render the walls safe, and that their work was interfered with by the objections of the tenant of the premises. *Lauer v. Palms*, 129 Mich. 671 (89 N. W. Rep. 694; 58 L. R. A. 67). Applying S. Dak. Comp. Laws, § 3603, providing that "every one is responsible, not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has wilfully or by want of ordinary care brought the injury upon himself," it is held that the owner of a building is liable for damages resulting to a party from the collapse of the building, by reason of such owner's failure to exercise proper care in ascertaining its condition. *Patterson v. Jos. Schlitz Brewing Co.*, S. Dak. (91 N. W. Rep. 336). In support of this holding the court cites: *Mullen v. St. John*, 57 N. Y. 567 (15 Am. Rep. 530); *Gill v. Middleton*, 105 Mass. 477 (7 Am. Rep. 548); *Watkins v. Goodall*, 138 Mass. 533; *Readman v. Conway*, 126 Mass. 374; *Looney v. McLean*, 129 Mass. 33 (37 Am. Rep. 295); *Ryder v. Kinsey*, 62 Minn. 85 (64 N. W. Rep. 94; 34 L. R. A. 557; 54 Am. St. Rep. 623); *City of Denver v. Soloman*, 2 Colo. App. 534 (31 Pac. Rep. 507). One who piles lumber in a street without authority is liable for any injury resulting from a fall thereof to a pedestrian stopping near by to rest. *Kessler v. Berger*, 205 Pa. St. 289 (54 Atl. Rep. 887; 61 L. R. A. 611). The owner of a slate factory who stands slabs of slate against his building, extending them across the property line onto the sidewalk, is liable for injury to a child seven years old resulting from the falling of one of

the slabs, although it stood within the building line, it appearing that the space where it stood was used in connection with and as a part of the sidewalk. *Rackmel v. Clark*, 205 Pa. St. 314 (54 Atl. Rep. 1027; 62 L. R. A. 859). For discussion of the rules governing the liability for injuries to a passer-by resulting from the fall of a fence erected to guard an excavation made on property alongside a public street, see *Sutphen v. Hedden*, 67 N. J. L. 324 (51 Atl. Rep. 721).

Sec. 93. Injuries to children. One storing dynamite on a vacant lot where children were accustomed to play, in a partially buried box, is liable to a child injured by its discovery of the same and playing therewith, under the belief that it was fire crackers. *Nelson v. McLellan*, 31 Wash. 208 (71 Pac. Rep. 747; 60 L. R. A. 793; 96 Am. St. Rep. 902). An occupier of a vacant lot known by him to be used as a common play ground for the children in that vicinity, who starts a fire thereon is not liable for the death of an infant of tender years resulting from its being attracted to the fire, though he took no precautions to keep the children from the fire. *Paolino v. McKendall*, 24 R. I. 432 (53 Atl. Rep. 268; 60 L. R. A. 133; 96 Am. St. Rep. 736). The owner of an uninclosed tract of land within a city, which has been graded to a level, leaving a bank on one side of the premises, to which premises adults are not invited, but suffered to resort for the purpose of playing baseball, which amusement attracts to the ground and along the bank young boys to witness the games, is not liable for injury to one of such boys, caused by the caving or falling of the top of such embankment, where its condition does not, to the knowledge of such owner, indicate a reasonable probability of such result. *Ann Arbor R. Co. v. Kinz*, 68 O. St. 210 (67 N. E. Rep. 479). A properly constructed drain four feet wide and two feet deep, made for the purpose of carrying off surface water, is not such a contrivance as would be so inviting to a child nine years old that the city would be liable for his death by drowning, due to his playing in the drain during or just after a very heavy rain. *City of Rome v. Cheney*, 114 Ga. 194 (39 S. E. Rep. 933; 55 L. R. A. 221). A city maintaining a reservoir of water, the top of which was 25 feet above the street, with a sloping surrounding surface, is not liable for the death of a child drowned therein who entered onto the premises through a hole in the fence surrounding the same, through which children could and did enter. *Peninsular*

Trust Co. v. City of Grand Rapids, 131 Mich. 571 (92 N. W. Rep. 38), following *Ryan v. Towar*, 128 Mich. 463 (87 N. W. Rep. 644; 55 L. R. A. 310; 92 Am. St. Rep. 481). A manufacturing company forming an unconcealed pool of hot water on its premises by the emptying of a steam boiler is not liable for injury resulting to a six year old boy while trespassing on the premises and walking into the water with knowledge of its character, although the company knew that children were accustomed to come to such pool. *Brinkley Car Works & Mfg. Co. v. Cooper*, 70 Ark. 331 (67 S. W. Rep. 752; 57 L. R. A. 724). An electric company which, with full knowledge of the situation, lays defectively insulated wires on the viaduct of a city street, outside but close to the traveled way, between which wires and way was a railing or balustrade, over which small boys were in the habit of climbing and getting close to the wires, is liable for the death of a boy caused by his coming in contact with such wires when in the act of climbing on the railing. *Consolidated Electric Light & Power Co. v. Healy*, 65 Kan. 798 (70 Pac. Rep. 884). A land owner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is a child does not raise a duty where none otherwise exists. Such a trespasser, injured on such premises, cannot recover damages of the landowner by reason of the unsafe condition of the premises, unless the landowner be guilty of such negligence as to amount to wanton injury. Applying these principles, it is held that one who, in the operation of his coal mines upon his own land, uses a cable running upon pulleys to haul coal cars from his mine, is not liable for injury to a child trespassing on the premises, and receiving same from such cable and pulleys. *Uthermohlen v. Bogg's Run Min. & Mfg. Co.*, 50 W. Va. 457 (40 S. E. Rep. 410; 55 L. R. A. 911; 88 Am. St. Rep. 884). See opinion for exhaustive collation of authorities disapproving the principles held in the "Turntable Cases."

Sec. 94. Injuries to children—Doctrine of "Turntable Cases." A railroad company maintaining a turntable on an unfenced lot, so situated as to be easily accessible and inviting to children in that locality, is liable for injuries received by a seven year old child while playing thereon, although the immediate cause of the injury was the acts of its playmates in unfastening and operating the turntable, where it appears that the company failed to use reasonable care so to guard and

fasten the turntable as to prevent injuries to children tempted to play on it. *Edgington v. Burlington, C. R. & N. Ry. Co.*, 116 Ia. 410 (90 N. W. Rep. 95). See opinion for exhaustive review of authorities on, and discussion of, this subject. The "doctrine of the turntable cases" is followed and approved in *Alabama G. S. R. Co. v. Crocker*, 132 Ala. 584 (31 So. Rep. 561); *Chicago, B. & Q. R. Co. v. Krayenbuhl*, Neb. (91 N. W. Rep. 880; 59 L. R. A. 920), collating conflicting authorities. But the supreme court of Georgia declines to encourage this doctrine and holds that one who makes an excavation upon his land is not bound to so guard it as to prevent injury to children who come upon it without his invitation, express or implied, but who are induced to do so merely by the alluring attractiveness of the excavation and its surroundings. *Savannah, F. & W. Ry. Co. v. Beavers*, 113 Ga. 398 (39 S. E. Rep. 82; 54 L. R. A. 314). The court concludes an exhaustive review of the cases by saying: "Among the cases relied on by defendant in error is that of *Ferguson v. Railway Co.*, 75 Ga. 637 (*Id.* 77 Ga. 102), wherein this court held: 'Where a railroad company leaves a dangerous machine, such as a turntable, unfastened in a city, on a lot which is not securely inclosed, and where people and children are wont to visit it and pass through it, this is negligence on the part of such company; and where an infant of ten or twelve years of age resorted to the turntable, and in riding upon it was dangerously and seriously injured, the railroad company is liable for damages for such injuries to the infant.' The rule of the so-called 'turntable cases' has been adopted by many of the courts, by others it has been severely criticised, and by some wholly repudiated. Some of the courts which have recognized the rule have limited its operation strictly to turntables and other dangerous and attractive machinery. It has been repudiated by the courts of last resort in New Hampshire, Tennessee, Massachusetts, New York, and New Jersey. See *Frost v. Railroad Co.*, 64 N. H. 220 (9 Atl. Rep. 790; 10 Am. St. Rep. 396); *Bates v. Railroad Co.*, 90 Tenn. 36 (15 S. W. Rep. 1069; 25 Am. St. Rep. 665); *Daniels v. Railroad Co.*, 154 Mass. 349 (28 N. E. Rep. 283; 13 L. R. A. 248; 26 Am. St. Rep. 253); *Walsh v. Railroad Co.*, 145 N. Y. 301 (39 N. E. Rep. 1068; 27 L. R. A. 724; 45 Am. St. Rep. 615); *Railroad Co. v. Reich*, 61 N. J. L. 635 (40 Atl. Rep. 682; 41 L. R. A. 831; 68 Am. St. Rep. 727). Liability was also denied in *Railroad Co. v. Bell*, 81 Ill. 76 (25 Am. Rep. 269), on account of 'the isolated position' of the turntable

in question. The rule was recognized in *Keffe v. Railway Co.*, 21 Minn. 207 (18 Am. Rep. 393), wherein Mr. Justice Young pronounced perhaps the ablest opinion ever delivered in support of the doctrine. The same court, however, in *Twist v. Railroad Co.*, 39 Minn. 164 (39 N. W. Rep. 402; 12 Am. St. Rep. 626), clearly intimated that the doctrine of the 'turntable cases' ought not to be extended and in *Stendal v. Boyd*, 67 Minn. 279 (69 N. W. Rep. 899), said: 'We did not mean by [what was said in *Twist v. Railroad Co.*, 39 Minn. 164 (39 N. W. Rep. 402; 12 Am. St. Rep. 626)] that we would not apply the doctrine to any but turntable cases, but merely that we would not extend the doctrine to cases which, upon their facts, did not come strictly and fully within the principle upon which those cases rest. We would not extend it to an ordinary case of a landowner merely allowing a pool of water or pond to stand on a vacant lot. To bring a case of such a pond within the principle of these cases, it would have to be exceptional and peculiar in its circumstances.' And in *Ratte v. Dawson*, 50 Minn. 450 (52 N. W. Rep. 965), and *Dehanitz v. City of St. Paul*, 73 Minn. 385 (76 N. W. Rep. 48), and in *Haesley v. Railroad Co.*, 46 Minn. 233 (48 N. W. Rep. 1023; 24 Am. St. Rep. 220), the principle was considerably limited in its application. In the last-mentioned case the court held: 'A railway company, maintaining what is known as a "gravity" yard or side track, has undoubtedly performed its duty as to a trespassing child of tender years, strictly not *sui juris*, when it securely fastens, by means of the ordinary appliance or brake, such cars as it may have occasion to place upon the grade of its track.' In *Koons v. Railroad Co.*, 65 Mo. 592, the doctrine of 'the turntable cases' was followed, but it was limited, as has been seen in *Overholt v. Veiths*, 93 Mo. 422 (6 S. W. Rep. 74; 3 Am. St. Rep. 557); and again in *Barney v. Railroad Co.*, 126 Mo. 372 (28 S. W. Rep. 1069; 26 L. R. A. 847), where the court held: 'Railroad cars and similar machinery are not "dangerous machines," within the meaning of the rule declaring turntables to be such;' and also in *Witte v. Stifel*, 126 Mo. 295 (28 S. W. Rep. 891; 47 Am. St. Rep. 668), where it was held: 'The owner of a building in process of construction in a city is not liable for injuries to a child playing thereat without his knowledge, and without any inducement or invitation, implied or otherwise, on his part to the child to go upon the premises.' In *Railway Co. v. Fitzsimmons*, 22 Kan. 686 (31 Am. Rep. 203), and *Railway Co. v. Dunden*, 37 Kan. 1 (14

Pac. Rep. 501), the doctrine of 'the turntable cases' is recognized; but in *Railroad Co. v. Bockoven*, 53 Kan. 279 (36 Pac. Rep. 322), where it appeared that a child was killed by falling off a defective gate of a railroad company, upon which it was swinging the court said: 'We are not willing to extend the rule declared by this court in the *Fitzsimmons* and *Dunden* Cases. In some of the courts the rule in those cases has been questioned, and in others denied.' In *Evanisch v. Railway Co.*, 57 Tex. 126 (44 Am. Rep. 586), and other cases decided by the supreme court of that state, the turntable rule has been followed; but in *Railroad Co. v. Dobbins*, (Tex. Civ. App.) 40 S. W. Rep. 861, affirmed by the supreme court of Texas, 91 Tex. 60 (41 S. W. Rep. 62; 38 L. R. A. 573; 66 Am. St. Rep. 856; See *Ballard's Law Real Prop.* Vol. VI, § 157), the rule is sharply criticised, the latter court holding: 'The common law does not impose upon the owner of property the duty to use care to keep his premises in such condition that a child of tender years going thereon may not be injured. * * * A railroad company which constructs a platform for the reception of freight and passengers, and a path of plank leading thereto, would not be liable to any one who fell from the path into an excavation, who was not going to or from the platform on business connected with the company.' There it appeared that plaintiff's child, less than three years old, fell into such excavation, and was drowned. The rule of the Turntable Cases was recognized also in *Barrett v. Southern Pac. Co.*, 91 Cal. 206 (27 Pac. Rep. 666; 25 Am. St. Rep. 186); but, as we have seen, in *Peters v. Bowman*, 115 Cal. 345 (47 Pac. Rep. 113, 598; 56 Am. St. Rep. 106), the rule was not extended to a case where a child trespassing upon an unguarded lot fell into a pond thereon and was drowned. The rule was also recognized in *Railroad Co. v. Bailey*, 11 Neb. 332 (9 N. W. Rep. 50); but, as we have already seen, in *Richards v. Connell*, 45 Neb. 467 (63 N. W. Rep. 915), it was not applied where the child of the plaintiff was trespassing upon the lot of the defendant, and was drowned by falling from a raft on a pond thereon. Adopting what we believe to be the wise course of these courts in limiting the doctrine of 'the turntable cases,' we hold that the case of *Ferguson v. Railway Co.*, 75 Ga. 637, (Id. 77 Ga. 102), is not authority which is applicable to the facts under consideration. Our conclusion is that the evidence in this case does not disclose the breach of any duty lawfully due from the defendant railway company to the deceased child, and consequently did not warrant a

finding that his death was occasioned by its negligence. Irrespective, therefore, of other questions presented, the verdict in favor of the child's father was without evidence to support it, and the trial court erred in not setting it aside.

As supporting the rule that the owner or occupier of land owes no duty of immunities to trespassing children, see the following cases and authorities therein cited: *Railroad Co. v. Henigh*, 23 Kan. 347 (33 Am. Rep. 167); *Green v. Linton*, (City Ct. Brook.) 27 N. Y. Supp. 891; *Powers v. Creem*, (Sup.) 48 N. Y. Supp. 21; *Newdell v. Young*, 80 Hun, 364 (30 N. Y. Supp. 84); *McAlpin v. Powell*, 70 N. Y. 126 (26 Am. Rep. 555); *Sterger v. Van Sicklen*, 132 N. Y. 499 (30 N. E. Rep. 987; 16 L. R. A. 640; 28 Am. St. Rep. 594); *Murphy v. City of Brooklyn*, 118 N. Y. 575 (23 N. E. Rep. 887); *Severy v. Nickerson*, 120 Mass. 306 (21 Am. Rep. 514); *McEachern v. Railroad Co.*, 150 Mass. 515 (23 N. E. Rep. 231); *McGuinness v. Butler*, 159 Mass. 233 (34 N. E. Rep. 259; 38 Am. St. Rep. 412); *Gay v. Railway Co.*, 159 Mass. 238 (34 N. E. Rep. 186; 21 L. R. A. 448; 38 Am. St. Rep. 415); *Holbrook v. Aldrich*, 168 Mass. 15 (46 N. E. Rep. 115; 36 L. R. A. 493; 60 Am. St. Rep. 364); *Galligan v. Manufacturing Co.*, 143 Mass. 527 (10 N. E. Rep. 171); *Breckenridge v. Bennett*, (Com. Pl.) 7 Kulp, 95; *Rodgers v. Lees*, 140 Pa. 475 (21 Atl. Rep. 399; 12 L. R. A. 216; 23 Am. St. Rep. 250); *Bridge Co. v. Jackson*, 114 Pa. 321 (6 Atl. Rep. 128); *Talty v. City of Atlantic*, 92 Ia. 135 (60 N. W. Rep. 516); *Ritz v. City of Wheeling*, 45 W. Va. 262 (31 S. E. Rep. 993; 43 L. R. A. 148); *Fredericks v. Railroad Co.*, 46 La. Ann. 1180 (15 So. Rep. 413); *O'Connor v. Railroad Co.*, 44 La. Ann. 339 (10 So. Rep. 678); *Railway Co. v. Cunningham*, 7 Tex. Civ. App. 65 (26 S. W. Rep. 474); *Oil Co. v. Morton*, 70 Tex. 400 (7 S. W. Rep. 756; 8 Am. St. Rep. 611); *Railway Co. v. Edwards*, 90 Tex. 65 (36 S. W. Rep. 430; 32 L. R. A. 825); *Slayton v. Railroad Co.*, 40 Neb. 840 (59 N. W. Rep. 510); *Vanderbeck v. Hendry*, 34 N. J. L. 467; *Phillips v. Library Co.*, 55 N. J. L. 307 (27 Atl. Rep. 478); *Fitzpatrick v. Manufacturing Co.*, 61 N. J. L. 378 (39 Atl. Rep. 675); *Benson v. Traction Co.*, 77 Md. 536 (26 Atl. Rep. 973; 39 Am. St. Rep. 436); *Kayser v. Lindell*, 73 Minn. 123 (75 N. W. Rep. 1038); *Dehanitz v. City of St. Paul*, 73 Minn. 385 (76 N. W. Rep. 48); *Buch v. Manufacturing Co.*, 69 N. H. 257 (44 Atl. Rep. 809; 76 Am. St. Rep. 163); *Robinson v. Railway Co.*, 7 Utah, 493 (27 Pac.

Rep. 689; 13 L. R. A. 765); *Charlebois v. Railroad Co.*, 91 Mich. 59 (51 N. W. Rep. 812); *Moran v. Palace Car Co.*, 134 Mo. 641 (36 S. W. Rep. 659; 33 L. R. A. 755; 56 Am. St. Rep. 543); *Clark v. City of Richmond*, 83 Va. 355 (5 S. E. Rep. 369; 5 Am. St. Rep. 281); *City of Indianapolis v. Emmelman*, 108 Ind. 530 (9 N. E. Rep. 155; 58 Am. Rep. 65)."

Sec. 95. Injuries to children—City maintaining defective gate which injures child climbing onto it. A city maintaining a gate at the entrance of a driveway on land owned by it which otherwise was unfenced is not liable for an injury resulting to a child ten years old from his climbing upon the gate and thus breaking it down, where the gate, though defective, was secure and if used properly there was no danger of its falling if touched or run against. *Gilmartin v. City of Philadelphia*, 201 Pa. St. 518 (51 Atl. Rep. 312). The court say: "As the land was unfenced, and, in a measure, thrown open to the public, it was the duty of the city to exercise ordinary care to keep it in a safe condition. Children attracted to it by curiosity, who, because of inexperience and indiscretion, might make an unusual use of objects on it, are not, in so doing, to be classed as trespassers. If an object was in itself dangerous, or might become dangerous if a child chanced to set it in motion while playing with it or by running against it, there is a duty on the city to take such precaution as was reasonable, under the circumstances, to prevent injury by it. On the other hand, the city was not required to anticipate and guard against dangers which might result from the improper use of objects safe in themselves, and for the use of which they were designed. There were many objects on this property which a child impulse might make a source of danger. But if a child had climbed a tree that had a decayed limb, or an insecurely fastened water spout, or on the roof of a low building that would not sustain his weight, and had been injured, we should not think of holding the city liable. The gate was apparently strong enough for the use to which it was put. It was secure if used properly, and there was no danger of it falling if touched or run against. It was unable to sustain the added weight of 50 or 60 pounds. In principle, this case resembles *Bridge Co. v. Jackson*, 114 Pa. 321 (6 Atl. Rep. 128), in which a boy seven years old, in crossing a bridge, walked outside of the ways provided for vehicles and pedes-

trains, upon a gas pipe. In that case it was said: 'It is not necessary to impute negligence to the child. It is sufficient that he was injured, not as a result of the use of the bridge, but as the consequence of his venturing, in childish recklessness, where no one, child or adult, has any business to be.'"

Sec. 96. Repairing sidewalk—Statutory obligation of abutting owner subservient to municipal control. A provision in the charter of a city making it "the duty of all real estate owners and occupants to keep the sidewalk alongside, or in front of, the same in good repair and free from snow and ice, and other obstructions, and they shall be liable for all damages or injuries occasioned by reason of the defective condition of any such sidewalk," is a legitimate exercise of the police power of the state; but where other provisions of the charter give the mayor and council and street commissioner complete jurisdiction and control over the streets and sidewalks, requiring abutting lot owners to build and repair sidewalks in accordance with notice from the city authorities, and making such owners liable for all damages resulting from defective walks, an absolute duty to repair on their own motion is not imposed on abutters, but only a duty to repair after being notified so to do by said authorities. *City of Lincoln v. Janesch* 63 Neb. 707 (89 N. W. Rep. 280; 56 L. R. A. 762; 93 Am. St. Rep. 478). The court say: "The validity of this provision, in so far as it undertakes to make the lot owner liable for all damages occasioned by reason of the defective condition of an adjacent sidewalk, is the first question discussed by counsel. It seems quite evident that the statute is referable to the police power of the state, and should be sustained as an exercise of that power by which both persons and property are subjected to all kinds of restraints and burdens for the convenience, comfort, and safety of society. Statutes requiring owners and occupants of lots bordering on public streets to remove snow and ice from their respective sidewalks have been upheld in Massachusetts and New York. *In re Goddard*, 16 Pick. 504; *Village of Carthage v. Frederick*, 122 N. Y. 268 (25 N. E. Rep. 480; 10 L. R. A. 178; 19 Am. St. Rep. 490). A contrary conclusion, however, was reached in *Gridley v City of Bloomington*, 88 Ill. 554 (30 Am. Rep. 566), and this conclusion was, by an almost evenly divided court, adhered to in *City of Chicago v. O'Brien*, 111 Ill. 532 (53 Am. Rep. 640). In *Reinkin v. Fuehring*, 130 Ind. 382

(30 N. E. Rep. 414; 15 L. R. A. 624; 30 Am. St. Rep. 247), it was held that a statute charging upon property owners the expense of sweeping adjacent streets was valid; and in *Mayor, etc., v. Mayberry*, 6 Hunph. 368 (44 Am. Dec. 315), an abutter was held personally liable for the costs of laying a new sidewalk. In Wisconsin and Michigan it has been assumed, without discussion, that the duty of repairing sidewalks may be imposed on lot owners, and that such owners may be held liable, according to the intention of the legislature, for all consequences of their defaults. *Hiner v. City of Fond du Lac*, 71 Wis. 74 (36 N. W. Rep. 632); *Morton v. Smith*, 48 Wis. 265 (4 N. W. Rep. 330; 33 Am. Rep. 811); *Henker v. City of Fond du Lac*, 71 Wis. 616 (38 N. W. Rep. 187); *Woodward v. City of Boscobel*, 84 Wis. 226 (54 N. W. Rep. 332); *Toutloff v. City of Green Bay*, 91 Wis. 490 (65 N. W. Rep. 168); *Selleck v. Tallman*, 93 Wis. 246 (67 N. W. Rep. 36); *City of Detroit v. Chaffee*, 70 Mich. 80 (37 N. W. Rep. 882); *Lynch v. Hubbard*, 101 Mich. 43 (59 N. W. Rep. 443). If lot owners may be required by the legislature, in the exercise of the police power of the state, to remove snow and ice from the adjacent streets, there would seem to be no very good reason why they may not also be required to remedy defects in adjacent sidewalks. The demand of public interest are no stronger in one case than in the other, and, as was said by Mr. Justice Brown, in *Lawton v. Steele*, 152 U. S. 133 (14 Sup. Ct. Rep. 499; 38 L. Ed. 385), the legislature is vested with a large discretion, not only to determine what the interests of the public require, but what measures are necessary to protect such interests. Our conclusion upon this branch of the case, based upon the decisions cited and many other authorities which we have consulted, among them being *Town of Macon v. Patty*, 57 Miss. 378 (34 Am. Rep. 451); *Sands v. City of Richmond*, 31 Grat. 571 (31 Am. Rep. 742); *Cooley, Tax'n* (2d Ed.) 588, and *Burroughs, Tax'n*, 494, is that the provision of the Lincoln charter above set out was enacted for the convenience and safety of the public and is unaffected by constitutional limitations upon the power of taxation. * * * Section 67 provides that the city authorities may require and regulate the construction of sidewalks, that such walks shall be constructed of such width and materials as the council may determine, and that the authorities may take up and remove all walks not laid in conformity to the rules and regulations which the council may adopt. It is further provided that 'in case

any property owner shall refuse or neglect to repair the sidewalk adjacent to his property within two days after being notified so to do in the manner prescribed by ordinance, the proper officer may cause said walk to be repaired, and shall report the cost thereof to the council, when the same may be assessed against such property.' Considering statutory provisions quite similar to these, the supreme court of New York, in *City of Rochester v. Campbell*, 123 N. Y. 415 (25 N. E. Rep. 939; 10 L. R. A. 393; 20 Am. St. Rep. 760), speaking by Ruger, J., said: 'It cannot be supposed that the legislature intended to impose an absolute duty to repair upon an individual who could not exercise it, except under the control of another. That the primary duty rests upon the municipality, notwithstanding a duty has also been imposed upon property owners, has been decided in this court, and it is inconsistent with this duty and the control which the municipality has of the streets to suppose that it was intended to impose a primary duty also upon the property owners. The two obligations are inconsistent with each other, and can lead only to confusion and delay in the performance of a public service. The existence of an absolute power of control in one party, and an imperative obligation to repair in another, is impossible. The obligation to repair is necessarily subservient to the other, and must be performed or neglected at the will and pleasure of the party having the right of control. There is no divided duty here. The obligation to keep the streets and the highways in repair rested on the towns. They could always perform this duty through the agency of others, and for the purpose of enabling them to do so they could in specific cases impose its performance on the lot owners, or compel them to pay the expense the town was subjected to in case it performed the duty; but the paramount obligation always rested upon the corporation.' The same question was before the supreme court of Wisconsin in *Toutloff v. City of Green Bay*, 91 Wis 490 (65 N. W. Rep. 168). In the course of the opinion, written by Winslow, J., it is said: 'Again, the lot owner has no choice as to the kind of repairs. It is very evident that the kind of repairs to be made, and the material to be used, are under the control of the street superintendent. If a lot owner proceeds of his own motion to repair, the street superintendent may stop him, compel him to change or remove what he has done, and require him to repair differently. Surely, if the lot owner must repair of his own motion, and owes that duty to every

passer-by, on pain or damages for injuries, he ought to know definitely what he is to do. He can hardly owe a definite duty when he has no means of knowing how to discharge it."

Sec. 97. Defective sidewalks—Liability of abutting owner. Although a water pipe belongs to an abutting owner and is appurtenant to his premises, he is not liable for injury resulting to a third person on account of it extending above the level of the sidewalk, where it was constructed by another and he has not the right to repair it. *Walker v. Marye*, 94 Md. 762 (51 Atl. Rep. 1054). In New York it is held that the owner of a building who so constructs a water pipe that the water accumulating on the building is discharged onto the sidewalk nearby, is liable for injury to a person from ice accumulating on the sidewalk by reason of the water being so discharged. *Parker, C. J., and O'Brien and Gray, JJ., dissenting. Tremblay v. Harmony Mills*, 171 N. Y. 598 (64 N. E. Rep. 501). A landlord is not liable for injury received by a person from falling on ice which has been allowed by the tenants to accumulate and remain on the sidewalk abutting the rented premises. This is true, though the ice resulted from water which had flowed from the landlord's property through a ditch placed there for the purpose of carrying off the refuse water across the sidewalk; the ice not being on the sidewalk when the tenants entered into possession, although the ditch was on the property at the time, and put there for the purpose above indicated. *Gardner v. Rhodes*, 114 Ga. 929 (41 S. E. Rep. 63; 57 L. R. A. 749). An abutting owner or occupant of premises who maintains a coal hole in a sidewalk in a city street, with a lid upon it, which he allows to become so insecure and unsafe that a traveler stepping thereon slips in the hole and is injured, is liable to such injured person, irrespective of whether there be liability on the part of the municipality. *O'Malley v. Gerth*, 67 N. J. L. 610 (52 Atl. Rep. 563).

Sec. 98. Defective sidewalks—Liability of city. The failure of a city to bridge over gutters crossing to the sidewalk is not negligence. *Heiss v. City of Lancaster*, 203 Pa. St. 260 (52 Atl. Rep. 201). Slight depressions or elevations in a sidewalk on a city street, otherwise properly constructed, does not render it dangerous so as to make the city liable for injuries resulting to a pedestrian therefrom. *Haggerty v. City*

of Lewiston, 95 Me. 374 (50 Atl. Rep. 55). Both the city and a contractor making improvements under a contract with it are liable for injury to a third party resulting from an unsafe and dangerous condition of a sidewalk caused by acts of the contractor, and which was not properly protected by him. A judgment against one bars an action against the other, and the corporation may have an action over against the contractor for any sum paid by it on judgment against it for such injury. *City of Anderson v. Fleming*, 160 Ind. 597 (67 N. E. Rep. 443). A city permitting a large limb of a tree to project dangerously low into a street is liable to one injured thereby without contributory negligence while driving in the street. *City of Louisville v. Michels*, Ky. (71 S. W. Rep. 511; 24 Ky. Law Rep. 1375). A city charged with the duty of keeping its streets in a reasonably safe condition for travel and free from obstructions is liable to a pedestrian who, in the absence of any light or other warning, runs against a barbed wire stretched across a street by an independent contractor having charge of the repairing of a part of the street, for the purpose of preventing travel on such part. *City of Glasgow v. Gillenwaters*, Ky. (67 S. W. Rep. 381; 23 Ky. Law Rep. 2375). For a discussion of what constitutes contributory negligence on the part of a pedestrian on a sidewalk, see *Mische v. City of Seattle*, 26 Wash. 616 (67 Pac. Rep. 357). For exhaustive note on "Liability of municipal corporation for injuries to travelers, caused by persons using the space under the street," see 61 L. R. A. 583-591.

The fact that municipal authorities have charge of a country highway, and who are under no obligation to construct a side path along the same, permit such a path to be constructed, most of which is on the same level as the highway but at a certain point is five or six feet above it, does not render them liable to a pedestrian for injury resulting from his falling from such elevated point while using the path on a dark night. *Seigler v. Mellinger*, 203 Pa. St. 256 (52 Atl. Rep. 175; 93 Am. St. Rep. 767). The court say: "A man desiring or being compelled to travel an unknown road on a dark night must always be in some uncertainty, if not in peril. The middle of the road is usually the freest from obstructions, and in the best condition for travel, and therefore is *prima facie* the proper and safest place to go, notwithstanding its special disadvantages in the risk of collision with vehicles having also the right of way. On the other hand a side path offers smoother and

more comfortable walking, but is liable to its own special dangers, such as produced the accident in this case. Plaintiff testified that the cinder side path at the point where he turned onto it, and along most of the distance, was level, or nearly so, with the rest of the roadway. In cities or municipalities, where there is a well-defined sidewalk, and on country roads in daylight, the side is usually the proper place for foot passengers, and circumstances might be shown as to the condition of the side path and of the general roadway that would make a question for the jury whether a traveler, even in the dark, might not be justified in following the former instead of the latter; but the presumption is that it is negligence to do so on a dark night on a country road. The circumstances testified to in the present case were not sufficient to overcome this presumption."

Sec. 99. Miscellaneous notes. If a tenant open a service pipe, and knowingly permit the same to remain open, and the gas to escape therefrom into or under the property occupied by him, and then carelessly ignites the same, his landlord cannot recover from the gas company the damages occasioned by the resulting explosion, although such gas company was guilty of negligence in not having cut the gas off from such service pipe. *Creel v. Charleston Nat. Gas. Co.*, 51 W. Va. 129 (41 S. E. Rep. 174; 90 Am. St. Rep. 772). Construing and applying Me. Rev. Stat., ch. 26, § 26, as amended by Laws 1891, ch. 89, requiring "every building in which any trade, manufacture, or business is carried on, requiring the presence of workmen above the first story," to be provided with suitable fire escapes it is held that the duty of providing and maintaining suitable fire escapes upon a building, to which the statute is applicable, is imposed upon the owner, notwithstanding the building is in the possession of a tenant, or, being in the possession of a tenant, is so used as to bring it within the application of the statute; but it is not decided whether or not this would be so if a building, not of itself belonging to one of the classes specified, and not let by the owner for any purpose mentioned in the section should come within the provisions of the law by reason of its use by the tenant, for any of such purposes, without the knowledge and consent of the owner. *Carrigan v. Stillwell*, 97 Me. 247 (54 Atl. Rep. 389; 61 L. R. A. 163).

DEDICATION.

EPITOME OF CASES.

Sec. 100. Dedication of land to public use—General principles. The public may acquire by dedication the right to have land unbuilt upon for the purpose of light and a view of the sea. *Attorney General v. Vineyard Grove Co.*, 181 Mass. 507 (64 N. E. Rep. 75). A dedication of land for a public highway is not shown by proof of a permissive use of it by the public for that purpose, although it has continued for the prescriptive period. *Hartley v. Vermillion*, Cal. (70 Pac. Rep. 273). The dedication of a street is not within the statute of frauds; it may be evinced by acts and declarations without any writing. *Mann v. Bergmann*, 203 Ill. 406 (67 N. E. Rep. 814). To constitute a valid dedication of private property for a public highway, it must clearly appear that the owner intended to dedicate the land for a highway, and that the public, by user or otherwise, accepted the land for that purpose. *Close v. Swanson*, 64 Neb. 389 (89 N. W. Rep. 1043). Where dedication of a road is in issue in civil proceedings, it may be established by a preponderance of the evidence. *Spencer v. Peterson*, 41 Or. 257 (68 Pac. Rep. 519).

Sec. 101. As to what constitutes—Maps and plats. Where the owner of land subdivides the same, and sells lots with reference to a plat which shows the streets and alleys of such subdivision, he is estopped to deny the existence of said streets and alleys, and a purchaser of lots in said subdivision is entitled to have the streets and alleys shown by the plat of the subdivision remain open for the use of his property and the use of the public. *Russell v. City of Lincoln*, 200 Ill. 511 (65 N. E. Rep. 1088); *Mann v. Bergmann*, 203 Ill. 406 (67 N. E. Rep. 814); *Spencer v. Peterson*, 41 Or. 257 (68 Pac. Rep. 519); *Collins v. Asheville Land Co.*, 128 N. C. 563 (39 S. E. Rep. 21; 83 Am. St. Rep. 720). For particular fact cases

illustrating the application of this rule, see *Michigan Cent. R. Co. v. City of Bay City*, 129 Mich. 264 (88 N. W. Rep. 638); *City of Eureka v. Gates*, 137 Cal. 89 (69 Pac. Rep. 850); *State v. Hamilton*, 109 Tenn. 276 (70 S. W. Rep. 619). As between the vendor and his vendees the dedication is complete without any acceptance by the municipal authorities, *Overland Mach. Co. v. Apenfels*, 30 Colo. 163 (69 Pac. Rep. 574); *Douthitt v. Canaday, Gillium & Key*, (Ky.) 73 S. W. Rep. 757 (24 Ky. Law Rep. 2159); but as to the latter they can claim no rights under it until an acceptance, *Town of Manitou v. International Trust Co.*, 30 Colo. 467 (70 Pac. Rep. 757). The signature to a plat by one of the owners by an agent invalidates it as a statutory plat. *Russell v. City of Lincoln*, 200 Ill. 511 (65 N. E. Rep. 1088). A dedication attempted by a plat which is invalid as a statutory dedication may be good as a common-law dedication. *Russell vs. City of Lincoln*, 200 Ill. 511 (65 N. E. Rep. 1088); *Village of Augusta v. Tyner*, 197 Ill. 242 (64 N. E. Rep. 378). A plat of lands adjacent to a railroad, made by the owner of such lands, is not evidence of a dedication of a right of way over the railroad tracks to the public for a highway, where it does not appear that he ever owned the land where the right of way was. *James v. Illinois Cent. R. Co.*, 195 Ill. 327 (63 N. E. Rep. 153). The leaving of an unmarked strip on one side of a recorded plat subdividing a tract into lots, similar to like strips on other sides which constitute one half of the public streets sufficiently shows the intention of the proprietor to dedicate such unmarked strip to the public to constitute one-half of a street. *Thompson v. Maloney*, 199 Ill. 276 (65 N. E. Rep. 236; 93 Am. St. Rep. 133). The dedication to an incorporated village on a navigable stream, whose boundary thereon included all the land to low water mark, of the streets and alleys marked on a plat of riparian lands by the owner thereof, will be presumed to include all the land between a street marked along the bank of the stream and the stream. *City of Uniontown v. Berry*, (Ky.) 72 S. W. Rep. 295 (24 Ky. Law Rep. 1692). As tending to establish a statutory dedication of city streets by plat, it is proper to show that the plat under which the dedication is claimed was accepted by resolution of the city council, though passed by a less vote than the statute required, and that the plat at the time formed a part of the city records and that the city had exercised authority over such streets. *City of Leadville v. Coronado Min. Co.*, 29 Colo. 17 (67 Pac. Rep. 289).

Sec. 102. As to what constitutes—Maps and plats—Marking “Hotel Site.” The designation on a plat by reference to which lots are sold, of a lot as a “Hotel Site,” does not render it incapable of being used for any other purpose, even in the hands of a purchaser of it after the destruction of a hotel which had been erected thereon. *Hanes v. West End Hotel & Land Co.*, 129 N. C. 311 (40 S. E. Rep. 114). The court say: “The court decided in *Conrad v. Land Co.*, 126 N. C. 776 (36 S. E. Rep. 282), that, as the purchasers of lots had been induced to buy under the map and plat, the streets and public grounds designated on the map should be forever open to the purchasers and to the public; but it was not intended to go to the length of extending that principle to a lot marked as the “Hotel Site.” All the streets on such a map are deemed in law to be of advantage to the owners of lots, and parks and squares are both useful and ornamental, and their use and benefit form such a consideration in the purchase of property laid out on the map, as that purchases are made largely upon such inducement. They are for the use of the public as well as for the purchasers. It is not certain, however, that a hotel would necessarily be a benefit to the owners of the lots. If it was a building of correct design and proportions, and well ordered in its management, it might be a benefit to the community; on the other hand, if it was an inferior structure, unsightly in its proportions, and badly conducted as an inn, it might be of more than doubtful utility. But beyond that the purchasers of lots had no more right to anticipate that the hotel would be built upon the lot of six acres than the other lots on the plat would be built upon. The certainty of streets and squares was the inducement to purchasers to buy the lots, the sale and utilization of other lots being a matter more of hope and faith than of implied bargain and contract. The lot marked ‘Hotel Site’ meant no more than if the promoters had said, ‘This would be a good location for a hotel.’ It was no guarantee that it would be built. It makes no difference that the plaintiff bought the six-acre lot after the hotel was burned, because there was no implied or express agreement that either he or the land company would rebuild it in case of its destruction.”

Sec. 103. As to what constitutes—Particular cases. The words in a deed, “to the intended New York avenue line, thence (2) southwardly along said New York avenue line,”

are not of themselves sufficient in law, to amount to a dedication by the grantor of the deed of other of his lands for a public street which shall be an extension of the street named. *Atlantic City v. Groff*, 68 N. J. L. 670 (54 Atl. Rep. 800). Where a coal company laid out on lands to which it retained the legal title a town site connected with a public highway, and erected thereon houses which it leased to its employees and leased building sites to others, and the streets were used by the inhabitants of the town site and others, it was held that there was a dedication and acceptance of them by the public so as to preclude the company from enjoining their use by a stranger. *marketing meat in competition with the company's store. Alden Coal Co. v. Challis*, 200 Ill. 222 (65 N. E. Rep. 665). See opinion for collation of numerous Illinois cases on what constitutes a dedication and acceptance. Streets shown on the plan of the park of an association organized to maintain a camp meeting and lease lots to persons desiring the advantages of the ground are dedicated to the use of the lessees and those, at their request, using them for access to their lots, so that the association cannot prevent such use. *Thousand Island Park Ass'n v. Tucker*, 173 N. Y. 203 (65 N. E. Rep. 975; 60 L. R. A. 786). For particular fact cases illustrating the sufficiency of evidence to establish the dedication of a street or highway, see *Lonaconing, M. & F. Ry. Co. v. Consolidated Coal Co.*, 95 Md. 630 (53 Atl. Rep. 420); *Thurston County v. Walker*, 27 Wash. 500 (67 Pac. Rep. 1099); *Huff v. Hastings Exp. Co.*, 195 Ill. 257 (63 N. E. Rep. 105); *Fountain v. Keen*, 116 Ia. 406 (90 N. W. Rep. 82); *Evans v. Welch*, 29 Colo. 255 (68 Pac. Rep. 776).

Sec. 104. Public squares and parks. Title to a square marked on a plat of lots as "Donated for graveyard," does not pass to a subsequently incorporated city including such square within its limits, but remains in the original owners, subject to the use of the public for the dedication. *Kansas City v. Scarritt*, 169 Mo. 471 (69 S. W. Rep. 283). A municipality having control of a public square may close it so as to prevent teams and vehicles from passing through it. *Guttery v. Glenn*, 201 Ill. 275 (66 N. E. Rep. 305). See opinion for particular plat on which public square was marked held not to show an intention to dedicate a street through it. Where the owner of land constituting a town site in laying it out stipulates that a certain space left opposite the ferry and fronting on a river

"shall be and continue free for the use of the inhabitants of the said town and for the travelers who may erect thereon temporary boat yards, or may from time to time occupy the same or any part thereof for making any vessels and other conveniences for conveying their property to and from said town," it is held that after its use as a boat yard has been abandoned the municipal authorities may occupy a small part thereof with a public building. *Commonwealth v. Burgess, etc., of Connellsville*, 201 Pa. St. 154 (50 Atl. Rep. 825). For construction of statutes and ordinances affecting Lake Park, in the city of Chicago, see *Bliss v. Ward*, 198 Ill. 104 (64 N. E. Rep. 705).

Sec. 105. Acceptance of dedication—Necessity of and what constitutes. An acceptance by the municipal authorities or public user is necessary to constitute dedicated streets public highways. *Pease v. Paterson & State Line Traction Co.*, N. J. L. (54 Atl. Rep. 524); *City of Huntington v. Townsend*, 29 Ind. App. 269 (63 N. E. Rep. 36). Municipal authorities can not claim any rights under a dedication until its acceptance by them. *Town of Manitou v. International Trust Co.*, 30 Colo. 467 (70 Pac. Rep. 757). There can be no acceptance of lands dedicated for a street while they are in the possession of the state and occupied by it in constructing a canal. *City of Huntington v. Townsend*, 29 Ind. App. 269 (63 N. E. Rep. 36). The bringing of an action of ejectment by a municipality for a dedicated street is a sufficient showing of its acceptance of the dedication. *Atlantic City v. Snee*, 68 N. J. L. 39 (52 Atl. Rep. 372). Ia. Code 1873, § 527, providing that no alley thereafter dedicated to public use should be deemed a public alley "unless the dedication shall have been accepted and confirmed by an ordinance specially passed for such purpose," does not prevent the showing of an acceptance by other acts than the adoption of a formal ordinance. *City of Keokuk v. Cosgrove*, 116 Ia. 189 (89 N. W. Rep. 983). See opinion for particular acts held to show an acceptance. Where a city, having power to make a park of a portion of a street, passes a resolution that a certain part of land, offered by the owner to be dedicated for a 120-foot street, should be enclosed as a public park, and subsequently passes resolutions for the protection of the street from the encroachment of a lake, an acceptance of the dedication is shown. *Shirk v. City of Chicago*, 195 Ill. 298 (63 N. E. Rep. 193). The using and working by the public of a part of a continuous

street sought to be created by dedication operates as an acceptance of the whole of it, although the remainder of the street is inclosed by a fence by the owner of the land making the dedication, where it appears that by his instrument of dedication he relinquished all claim to the streets laid out, and made no claim to the inclosed portion, but announced that he would open it up by setting the fence on the proper line as soon as he was able. *Village of Augusta v. Tyner*, 197 Ill. 242 (64 N. E. Rep. 378). In Indiana it is held that an acceptance by a city of an offered dedication of a street, sufficient to render it liable for injury resulting from its failure to keep the same in repair, is shown by evidence that the owners of the land graded the street, built a sidewalk, had telegraph poles strung along it, and that the public used it extensively as a street, for two or three years before the injury occurred, and that there was at the time of and before the injury a hotel being built and constructed which fronted upon this street. *City of Hammond v. Maher*, 30 Ind. App. 286 (65 N. E. Rep. 1055).

Sec. 106. Revocation or abandonment of dedication.

Where a landowner dedicates a strip as an alley, neither he, nor his grantee of such strip, can revoke the dedication as to those purchasing and making improvements with reference to the dedication. *City of Keokuk v. Cosgrove*, 116 Ia. 189 (89 N. W. Rep. 983). For a discussion of what acceptance of a dedication of a way made to a city by deed will bar the grantor's right to revoke, see *Atlantic City v. New Auditorium Pier Co.*, 63 N. J. Eq. 644 (53 Atl. Rep. 99). An abandonment of a city street after its dedication to and acceptance by the public is not affected by the city adopting a map which omitted to designate such street. *City of Eureka v. Gates*, 137 Cal. 89 (69 Pac. Rep. 850). No right can be acquired against the public because a dedicated street is not opened to its full width. *Atlantic City v. Snee*, 68 N. J. L. 39 (52 Atl. Rep. 372).

DEEDS.

EPITOME OF CASES.

Sec. 107. Deeds and wills distinguished. An instrument in the form of a deed and probated as such, and which contains no power of revocation and does not postpone the title until after the death of the grantor, will not be construed as a will on account of the deed embracing both real and personal property and the grantor using the word "bequeath" in connection with the word "convey," stating, I "bequeath and convey" to the grantee certain designated lands and the personal property "that I now possess or may come into the possession of during my natural life." *Harper v. Reaves*, 132 Ala. 625 (32 So. Rep. 721). An instrument in the form of a deed, duly acknowledged, delivered and recorded, which purports to sell and convey certain real estate with covenants of title, warranty, and against incumbrances, will not be construed as an ineffectual testamentary disposition on account of containing a clause that it is made "subject, however, to the occupancy and possession of said real estate for and during the natural life of the grantor; the intention being that his deed shall not be in force or take effect until after the death of the grantor herein," but will be given effect as a deed conveying a present interest, with possession postponed until the grantor's death. *Saunders v. Saunders*, 115 Ia. 275 (88 N. W. Rep. 329). An instrument in the form of a deed and attested as such containing a stipulation "this deed to take effect at my death" will be treated, not as a will, but as a conveyance passing title in praesenti with right of possession postponed until death of the maker. *West v. Wright*, 115 Ga. 277 (41 S. E. Rep. 602). The same principle is held in *Christ v. Kuehne*, 172 Mo. 118 (72 S. W. Rep. 537); *Sibley v. Somers*, 62 N. J. Eq. 595 (50 Atl. Rep. 321). An instrument in the form of a deed of conveyance, which contains a clause that "the intention of this instrument is that the grantor relinquishes her

right at her death, then this deed is to come immediately into effect, but not until then," is testamentary in character, and inoperative as a deed. *Murphy v. Gabbert*, 166 Mo. 596 (66 S. W. Rep. 536; 89 Am. St. Rep. 733). The court say: "It is well settled that an instrument of writing, to be good as a deed, must pass a present interest in the property attempted to be conveyed, and that where it takes effect and becomes operative alone upon the death of the grantor, it is testamentary in character, and insufficient as a deed. *Miller v. Holt*, 68 Mo. 584; 1 Devl. Deeds, § 309; *Pinkham v. Pinkham*, 55 Neb. 729 (76 N. W. Rep. 411); *Turner v. Scott*, 51 Pa. 126; *Leaver v. Gauss*, 62 Ia. 314 (17 N. W. Rep. 522); *Donald v. Nesbitt*, 89 Ga. 290 (15 S. E. Rep. 367); *Bigley v. Souvey*, 45 Mich. 370 (8 N. W. Rep. 98); *Nichols v. Emery*, 109 Cal. 323 (41 Pac. Rep. 1089; 50 Am. St. Rep. 43); *Conrad v. Douglas*, 59 Minn. 498 (61 N. W. Rep. 673); *White v. Hopkins*, 80 Ga. 154 (4 S. E. Rep. 863); *Hazleton v. Reed*, 46 Kan. 73 (26 Pac. Rep. 450; 26 Am. St. Rep. 86); *Singleton v. Bremar's Adm'x*, 4 McCord, 12 (17 Am. Dec. 699); *Habergham v. Vincent*, 2 Ves. 205; *Hannig v. Hannig*, Tex. Civ. App. (24 S. W. Rep. 695); *In re Diez's will*, 50 N. Y. 88; *Cunningham v. Davis*, 62 Miss. 366." For exhaustive note on "What constitutes a testamentary writing," see 89 Am. St. Rep. 486-500.

Sec. 108. Consideration. The relation of in loco parentis between the grantor and grantee in a deed furnishes a meritorious consideration for it, and the existence of this relation may be established by a grantee who is the illegitimate child of the grantor. *Pickett v. Garrard*, 131 N. C. 195 (42 S. E. Rep. 579). The resumption of the marital relation and the abandonment of a suit for divorce, by a wife living apart from her husband with good grounds for a divorce, is a sufficient consideration for his agreement to convey property in trust for their children. *Moayon v. Moayon*, Ky. (72 S. W. Rep. 33; 60 L. R. A. 415; 24 Ky. Law Rep. 1641). The release of his expectancy as an heir by one to whom a tract of land is conveyed by warranty deed by his father, in full of such grantee's interest in the grantor's estate, is a sufficient consideration for the conveyance and the covenants of warranty. *Longshore v. Longshore*, 200 Ill. 470 (65 N. E. Rep. 1081). The payment by one party of the purchase price of land, the title to which is taken in another, is sufficient consideration to

sustain a deed by the attorney in fact of the latter to the former, and such a deed is therefore valid, although it recites merely a nominal consideration. *Linnell v. Hudson*, 59 S. C. 283 (37 S. E. Rep. 927).

Sec. 109. Delivery of deed—General principles. A deed may be delivered before its acknowledgment. *Hudson v. Redford*, (Ky.) 67 S. W. Rep. 35 (23 Ky. Law Rep. 2347). Any thing which signifies the intention of the grantor to part with his control or dominion over the deed so that it may become a muniment of title to the grantee operates as a legal delivery. *Smith v. May*, 3 Penn. (Del.) 233 (50 Atl. Rep. 59). Delivery of a deed depends on the intent of the parties, and, though not made in formal words, may be shown by circumstances. If the parties meet to make it, and read, sign, and acknowledge it without reservation, this amounts to delivery. *Adams v. Baker*, 50 W. Va. 249 (40 S. E. Rep. 356). The acknowledgment of the "due execution" of a deed by its grantors contained in their certificate of acknowledgment does not create a presumption of the delivery of the deed. *Tarlton v. Griggs*, 131 N. C. 216 (42 S. E. Rep. 591). Where a duly executed deed is found in the hands of the grantee, there is a strong implication that it has been delivered, and only clear and convincing evidence can overcome the presumption. *Inman v. Swearingen*, 198 Ill. 437 (64 N. E. Rep. 1112). The placing of a deed in the hands of a grantee by his grantor, under such circumstances that show the absence of an intention that it should become operative as such, does not constitute a delivery. *Kenney v. Parks*, 137 Cal. 527 (70 Pac. Rep. 556). There is no delivery of a deed where the maker has not gone so far with its execution that he cannot recall or control it. *Tarlton v. Griggs*, 131 N. C. 216 (42 S. E. Rep. 591). Delivery to the life tenant alone of a deed conveying a life estate, with remainder to others, is sufficient. *Chapin v. Nott*, 203 Ill. 341 (67 N. E. Rep. 833). A deed duly executed and recorded by the owner of land, to a contemplated corporation, which is delivered to a promoter of such corporation to be by him delivered to the corporation when organized, is valid when such second delivery is properly made. *Santaquin Min. Co. v. High Roller Min. Co.*, 25 Utah, 282 (71 Pac. Rep. 77). A president of a corporation executing a deed to it can not make delivery thereof to himself as such president. *Taylor v. Seiter*, 199 Ill. 555 (65 N. E. Rep. 433). Nothing ap-

pearing to the contrary, a deed will be presumed to have been delivered at the time of its date. *Atlantic City v. New Auditorium Pier Co.*, 63 N. J. Eq. 644 (53 Atl. Rep. 99); *Williams v. Armstrong*, 130 Ala. 389 (30 So. Rep. 553); *McDougall v. McDougall*, 135 Cal. 316 (67 Pac. Rep. 778). For particular case determining what constitutes delivery of a deed to a minor, see *McNear v. Williamson*, 166 Mo. 358 (66 S. W. Rep. 160).

Sec. 110. Delivery of deed—Particular cases. There is no delivery of a deed executed by a vendor which he retains in order that his wife, who was ill at the time, might subsequently sign it. *Wilson v. Winters*, 108 Tenn. 398 (67 S. W. Rep. 800). Where a grantor in a deed to his grandchild thirteen years of age records the deed and delivers it to her mother, there is a sufficient delivery. *Chapin v. Nott*, 203 Ill. 341 (67 N. E. Rep. 833). Where a grantor executes a deed to an infant son and delivers it to an older brother of the grantee to take care of it and deliver it to the grantee when he becomes of age, the grantor parting with all control over the deed which is subsequently delivered by recording, there is a sufficient delivery of the deed. *Marshall v. Hartzfelt*, 98 Mo. App. 178 (71 S. W. Rep. 1061). The question as to whether a grantor executing a deed and leaving it with his attorney thereby intended a delivery to the grantee, is one of fact for the jury. *Fitzpatrick v. Brigman*, 133 Ala. 242 (31 So. Rep. 940). See former opinion in this case in 130 Ala. 450 (30 So. Rep. 500). Particular cases in which evidence is held sufficient to show delivery of deed. *Hildebrand v. Willig*, 64 N. J. Eq. 249 (53 Atl. Rep. 1035); *Valter v. Blavka*, 195 Ill. 610 (63 N. E. Rep. 499); *Phelan v. Hyland*, 197 Ill. 395 (64 N. E. Rep. 360); *Barnard v. Thurston*, 86 Minn. 343 (90 N. W. Rep. 574); *Seifert v. Seifert*, 66 Kan. 732 (71 Pac. Rep. 271); *Kelsa v. Graves*, 64 Kan. 777 (68 Pac. Rep. 607). Particular evidence held insufficient to show delivery of deed. *Cameron v. Gray*, 202 Pa. St. 566 (52 Atl. Rep. 132); *Dagley v. Black*, 197 Ill. 53 (64 N. E. Rep. 275); *Merchant v. Guilds*, 129 Mich. 168 (88 N. W. Rep. 391).

Sec. 111. Delivery by recording—Presumptions. The recording of a deed merely raises a presumption of its delivery which may be rebutted. *Neel v. Neel*, 65 Kan. 858 (69 Pac.

Rep. 162); *Smith v. May*, 3 Penn. (Del.) 233 (50 Atl. Rep. 59). The fact that a deed has been recorded is not under all circumstances prima facie evidence that it has been delivered. *Egan v. Horrigan*, 96 Me. 46 (51 Atl. Rep. 246). Where an owner of land executed and recorded a deed thereof to his daughter with the intent to vest title in her to prevent his creditors from seizing the land, of which intent she had knowledge, the presumption of delivery will be held to be conclusive. *Brady v. Huber*, 197 Ill. 291 (64 N. E. Rep. 264; 90 Am. St. Rep. 161). A vendee in possession of land under an executory contract of purchase, by the terms of which he is not entitled to a deed until payment of the purchase price, who obtains possession of and records a deed executed to him by his vendor and filed by him in the clerk's office with his complaint in an action on the contract, without such vendor's consent, does not thereby effect a delivery of the deed. *Schaefer v. Purviance*, 160 Ind. 63 (66 N. E. Rep. 154). The recording by parents of a deed of gift executed by them to their infant son creates a presumption of delivery and acceptance, the gift being beneficial, although the deed is returned to them by the recording officer and they remain in possession. *Lay v. Lay*, (Ky.) 66 S. W. Rep. 371 (23 Ky. Law Rep. 1817). Where a widow, competent to transact business and contemplating remarriage, goes before a notary and in the presence of her children executes a deed to them of her land, reserving a life estate to herself, which deed is left with the notary and he records it and returns it to the grantor, the presumption of delivery arising from the recording of the deed is not overcome by her possession of it. *Valter v. Blavka*, 195 Ill. 610 (63 N. E. Rep. 499). For particular evidence held insufficient to overcome the presumption of delivery of a deed arising from its recording, see *Dewitt v. Shea*, 203 Ill. 393 (67 N. E. Rep. 761; 96 Am. St. Rep. 311). For a discussion of the general rule as to the delivery of a deed by recording and an application of it to particular facts, see *Chivers v. Race*, 196 Ill. 71 (63 N. E. Rep. 701). As to the strength of the presumption of delivery created by the recording of a deed and evidence necessary to overcome it, see *Egan v. Horrigan*, 96 Me. 46 (51 Atl. Rep. 246). In Alabama, the filing of a deed for record by a grantor after due signature and attestation constitutes a delivery. *Gulf Red Cedar Co. v. O'Neal*, 131 Ala. 117 (30 So. Rep. 466; 90 Am. St. Rep. 22).

Sec. 112. Delivery to third persons to be delivered after grantor's death. Where the grantor executes a deed and places it in the control of a third party, to be delivered to the grantee after the grantor's death, reserving no right to recall or revoke the same, such facts constitute a valid delivery, *Bogan v. Swearingen*, 199 Ill. 454 (65 N. E. Rep. 426); *St. Clair v. Marquell*, 161 Ind. 56 (67 N. E. Rep. 693); *Meech v. Wilder*, 130 Mich. 29 (89 N. W. Rep. 556); and title passes to the grantee upon delivery to him being accordingly made. *White v. Watts*, 118 Ia. 549 (92 N. W. Rep. 660). Citing, *Trask v. Trask*, 90 Ia. 318 (57 N. W. Rep. 841; 48 Am. St. Rep. 446); *Hinson v. Bailey*, 73 Ia. 544 (35 N. W. Rep. 626; 5 Am. St. Rep. 700); *Bury v. Young*, 98 Cal. 446 (33 Pac. Rep. 338; 35 Am. St. Rep. 186); *Wheelwright v. Wheelwright*, 2 Mass. 452 (3 Am. Dec. 66); *Hathaway v. Payne*, 34 N. Y. 106; *Foster v. Mansfield*, 3 Metc. (Mass.) 412 (37 Am. Dec. 154). To constitute a delivery in this manner the deed must be left with the depositary without any reservation on the part of the grantor, either express or implied, of the right to recall it or otherwise to control its use. There is no delivery if the grantor retains control of the deed. *Johnson v. Johnson*, 24 R. I. 571 (54 Atl. Rep. 378); *Stout v. Stout*, 28 Ind. App. 502 (63 N. E. Rep. 250). Such a reservation of control over the deed by the grantor as will invalidate a delivery so made is not shown by the fact that the depositary would have turned the deed over to the grantor had he demanded it, nor by the fact, in a case where there were several deeds, that the grantor ordered one of them to be delivered before his death. *White v. Watts*, 118 Ia. 549 (92 N. W. Rep. 660). Such a delivery is not violative of a stipulation in the deed that it was to be "delivered and recorded to the grantee on the death of the grantors," the delivery referred to by the deed evidently meaning the actual delivery to the grantee therein named for recording, and not to a delivery by the grantor to a third party to see that this provision of the grantor was carried out. *Meech v. Wilder*, 130 Mich. 29 (89 N. W. Rep. 556).

Sec. 113. Delivery in escrow. The conditions of an escrow may rest in parol. After a deed has been deposited in escrow to be delivered upon the happenings of a certain event or the performance of a specified condition, the depositor is not at liberty to withdraw the deed or forbid its delivery without the consent of the other party; nor does the death of the grantor

defeat the escrow. *Thoraldsen v. Hach*, 87 Minn. 168 (91 N. W. Rep. 467).

Sec. 114. Acceptance of deed. There is no presumption of the acceptance of a deed by a grantee not under disability, although beneficial to her, where she was not aware of the existence of the deed until after the grantor's death. *Dagley v. Black*, 197 Ill. 53 (64 N. E. Rep. 275). Where one to whom a deed was executed while he was an infant acquiesces in such deed for three of four years after attaining his majority, with full knowledge thereof, he will be deemed to have accepted it. *Locknane v. Hoskins*, (Ky.) 69 S. W. Rep. 719 (24 Ky. Law Rep. 639). Where a city by a resolution of its common council accepts a vendor's written offer to sell real estate and a deed is afterward executed and delivered to the city clerk who caused it to be recorded after an order has been drawn for the payment of the purchase price by resolution of the council, there is such an acceptance of the deed as authorizes the vendor to maintain an action for the purchase price, without the passage by the council of a special resolution accepting the deed. *Beckrich v. City of North Tonawanda*, 171 N. Y. 292 (64 N. E. Rep. 6).

A grantee who receives a deed, tenders it to the recorder to be recorded, pays the fee therefor and asks to have the lots conveyed transferred to him for taxation, will be deemed to have accepted the deed, and in the absence of fraud or mistake can not assert that other property should have been embraced in the deed. *Horner v. Lowe*, 159 Ind. 406 (64 N. E. Rep. 218). The court say: "When a deed has been delivered and accepted, it is deemed, in the absence of fraud or such mistake as equity will relieve against, as a complete relinquishment of conflicting reservations in any prior executory contract relative to the conveyance. *Bethell v. Bethell*, 92 Ind. 318; *Gibson v. Richart*, 83 Ind. 313; *Howes v. Barker*, 3 Johns. 506 (3 Am. Dec. 526); *Cronister v. Cronister*, 1 Watts & S. 442; *Jones v. Wood*, 16 Pa. 25; *Carter v. Beck*, 40 Ala. 599; *Bryan v. Swain*, 56 Cal. 616; *Slocum v. Bracy*, 55 Minn. 249 (56 N. W. Rep. 826; 43 Am. St. Rep. 499); *Clifton v. Iron Co.*, 74 Mich. 183 (41 N. W. Rep. 891; 16 Am. St. Rep. 621, and monographic note); *Rawle, Cov.* (4th Ed.) 566."

Sufficient acceptance of deeds of gift executed without the knowledge of the grantees and delivered after the grantor's death is shown by their taking the deeds and asserting rights thereunder. *White v. Watts*, 118 Ia. 549 (92 N. W. Rep. 660).

The court say: "It is further said that the grantees had no knowledge of the existence of the deeds in their favor until after the death of their father, and therefore there could have been no such acceptance of the gifts as will make them effectual in law. While an acceptance is necessary to make a gift effectual, the great weight of authority upholds the rule that the acceptance of a deed of valuable property will be presumed, although the grantee had no knowledge of the provision for his benefit; and this is especially true where the conveyance imposes no condition or burden upon the grantee. In such case, if the grantee accepts the benefit when the fact is brought to his knowledge, the acceptance relates back to the date of the conveyance. *Mitchell's Lessee v. Ryan*, 3 O. St. 386; *Guggenheimer v. Lockridge*, 39 W. Va. 461 (19 S. E. Rep. 874); *Hal-luck v. Bush*, 2 Root, 26 (1 Am. Dec. 60); *Maynard v. Maynard*, 10 Mass. 456 (6 Am. Dec. 146); *Church v. Gilman*, 15 Wend. 656 (30 Am. Dec. 82); *Barns v. Hatch*, 3 N. H. 304 (14 Am. Dec. 369); *Dunlap v. Dunlap*, 94 Mich. 11 (53 N. W. Rep. 788); *Hatch v. Hatch*, 9 Mass. 307 (6 Am. Dec. 67); *Belden v. Carter*, 4 Day, 66 (4 Am. Dec. 185); *Parker v. Parker*, 56 Ia. 111 (8 N. W. Rep. 806)."

Sec. 115. Alteration in deed—Agreement to surrender deed. When a deed has been fully executed and delivered, it passes the title to the grantee therein, which can not thereafter be divested by mere change in the deed itself, with or without the consent of the grantee. *Gulf Red Cedar Co. v. O'Neal*, 131 Ala. 117 (30 So. Rep. 466; 90 Am. St. Rep. 22). The title of grantees in a deed is not affected by any mere verbal agreement by them to surrender the deed which has never been carried into effect. *Goodwin v. Tyrrell*, Ariz. (71 Pac. Rep. 906).

Sec. 116. Construction of deeds—General rules and principles. A deed to a designated grantee "and her children born and to be born," passes no estate to after-born children. *Miller v. McAlister*, 197 Ill. 72 (64 N. E. Rep. 254). A practical construction given a deed by the parties thereto, not inconsistent with its terms, will be adopted. *Neff v. Pennsylvania R. Co.*, 202 Pa. St. 371 (51 Atl. Rep. 1038). All parts of a deed must be considered together, hence a clause limiting the interest of the grantee to a life estate, following a covenant of warranty, will prevail over technical words in the

granting and habendum clauses importing a fee. *Atkins v. Baker*, 112 Ky. 877 (66 S. W. Rep. 1023; 23 Ky. Law Rep. 2224). The character "&" will be read "and." *Beedy v. Finney*, 118 Ia. 276 (91 N. W. Rep. 1069). Citing, *Hunt v. Smith*, 9 Kan. 153; *Commonwealth v. Clark*, 4 Cush. 596; *Malton v. State*, 29 Tex. App. 527 (16 S. W. Rep. 423); *Pickens v. State*, 58 Ala. 364; *Brown v. State*, 16 Tex. App. 245. Where there is a conflict between the granting part of a deed and recitals in it, as to the character of estate conveyed, the former controls. *Dunbar v. Aldrich*, Miss. (31 So. Rep. 341).

Sec. 117. Construction of deeds—Conflict between habendum and granting clauses. As a general rule the habendum clause cannot frustrate a grant complete before, or abridge or lessen the estate granted; but where the grant is uncertain or indefinite concerning the estate intended to be vested in the grantee, the habendum may perform the office of defining, qualifying or controlling the estate granted, and it may, though repugnant to the estate granted, control, if it is in accord with the intention of the grantor clearly appearing from the deed when taken as a whole. *Wilson v. Terry*, 130 Mich. 73 (89 N. W. Rep. 566). See opinion for discussion of this subject. In construing a deed by N. J. Beedy, reciting that the grantor does "hereby sell and convey unto the said Lucy H. Beedy" the property described, and that "it is understood and agreed that the above conveyance is to be good and valid during the life of said Lucy H. Beedy, the grantee, but at her death the property, or the value thereof, to revert to the heirs of said Lucy H. and N. J. Beedy," it is held that the habendum was not void by reason of conflict with the granting clause. *Beedy v. Finney*, 118 Ia. 276 (91 N. W. Rep. 1069). The court say: "The repugnancy, to defeat the habendum, must be such that the intention of the parties either cannot be ascertained from the whole instrument, or, if ascertained, cannot be carried into effect. If, from the entire instrument and attending circumstances, it appears that the grantor intended to enlarge, restrict, or even repugn the conveyancing clause, the habendum will control. It is then to be regarded as an addendum or proviso to the granting clause, which will control it even to the extent of destroying its effect. In short, the modern rule requires the consideration of the deed as a whole, and not in separate and distinct parts, as was formerly done, and the finding of repugnancy avoided whenever all the pro-

visions of the instrument may, without ignoring the accepted canons of construction, be given force and carried into effect. *Bassett v. Budlong*, 77 Mich. 338 (43 N. W. Rep. 984; 18 Am. St. Rep. 404); *Williams v. Bentley*, 27 Pa. 294; *Bodine's Adm'rs v. Arthur*, 91 Ky. 53 (14 S. W. Rep. 904; 34 Am. St. Rep. 162); 1 *Jones*, Real Prop., ch. 20; *Berrige v. Glassey*, 112 Pa. 442 (3 Atl. Rep. 583; 56 Am. Rep. 324, and note); *Powers v. Hibbard*, 114 Mich. 533 (72 N. W. Rep. 339, 346); *Doren v. Gillum*, 136 Ind. 134 (35 N. E. Rep. 1101). In the last case the court said: 'Words importing a greater estate than one for life in the first taker may, by force of context, be so limited as to give the first taker a life estate only, with a remainder over. *Reeder v. Spearman*, 6 Rich. Eq. 89; *Gillam v. Caldwell*, 11 Rich. Eq. 73. The estate may be limited in the habendum, although not mentioned in the premises of a deed, and without the use of the word "remainder." *Wager v. Wager*, 1 Serg. & R. 374; *Wormmack v. Whitmore*, 58 Mo. 448. And the latter part of a deed has been allowed to control, and rendered what seemed to be a fee a life estate in the first taker. *Prior v. Quackenbush*, 29 Ind. 475.' *Montgomery v. Sturdivant*, 41 Cal. 290; *Riggin v. Love*, 72 Ill. 553; *Baskett v. Sellers*, 93 Ky. 2 (19 S. W. Rep. 9); *Humphrey v. Foster*, 13 Grat. 653; 9 Am. & Eng. Enc. Law, (2d Ed.) 141."

Sec. 118. Construction of particular deeds. Where a deed by N. J. B. to his wife, L. H. B. stipulated that after a life estate to her the property or the value thereof, at her death, should revert to the heirs of said L. H. & N. J. B., "heirs" will be held to mean the issue of such grantor and wife, and not the heirs of each. *Beedy v. Finney*, 118 Ia. 276 (91 N. W. Rep. 1069). The estate conveyed by a deed executed by an heir conveying an undivided three-sevenths interest in certain described lands cannot be cut down by a subsequent stipulation designating the land conveyed as "being the interest I hold as heir at law of P. J., deceased, and the interest acquired by purchase from two other heirs." *Johnson v. Johnson*, 170 Mo. 34 (70 S. W. Rep. 241; 59 L. R. A. 749). In Missouri it is held that a conveyance in which the grantors "granted, bargained and sold" to F. A. C. certain described premises, "to have and to hold the premises hereby conveyed, with all the rights, privileges and appurtenances thereto belonging or in any way appertaining, unto the said F. A. C. and her bodily heirs and assigns, forever; and in which the

covenants were made with said grantee "her heirs and assigns, for herself, her heirs, executors and administrators," conveys to grantee a life estate with remainder in fee to her children. *Utter v. Sidman*, 170 Mo. 284 (70 S. W. Rep. 702). A stipulation in a deed of a strip of land having an ocean front that the "grantors shall not be prohibited from building a pier in front of their property," applies only to a pier erected in the future, and has no relation to a pier existing at the time of the conveyance. *Atlantic City v. Young & McShea Amusement Co.*, 63 N. J. Eq. 831 (53 Atl. Rep. 168). A deed by one in trust for his children constitutes an immediate grant vesting an estate in the grantees in being at the time, nor is a life estate created so as to let in after-born children, by the grantor's reservation of a room in the house conveyed and a living with the grantee so long as the grantor survives. *Darrah v. Darrah*, 202 Pa. St. 492 (52 Atl. Rep. 183). The conveyance in connection with mill property and mill privileges of the "use and occupancy" of certain land "for the benefit of the mill and mill privilege and the public, * * * which last premises are always to be left open for travel," does not pass the fee to such land but only the use for the particular purpose, it appearing that the mill property was not accessible except across this land and no other use of the land would have been beneficial to the mill property or the public. *Tupper v. Ford*, 73 Vt. 85 (50 Atl. Rep. 547). Under a deed conveying land with a grist mill thereon "together also the sole and exclusive right for the owner or occupier of the said grist mill, their or his heirs and assigns, forever, the use of the waters of the spring known as the 'Sand Spring,' and the outflow, without any interruption or molestation whatsoever for the use of said mill," the spring being upon other land, the grantee acquires no right to use the waters of said spring for any other than mill purposes. *Woodring v. Hollenback*, 202 Pa. St. 65 (51 Atl. Rep. 318). Where the owner of a block lying alongside a public street, a short time before the vacation of the street, conveys the block by deed describing it as such, and by a separate clause therein also quitclaims all title, in being and reversion, to the land occupied by the streets, there is a severance of the block and the street, and a conveyance of the former after a conveyance of the street does not pass that part of the land embraced in the street, although it conveys the block "together with all appurtenances," etc. *Overland Mach. Co. v. Apenfels*, 30 Colo. 163 (69 Pac. Rep. 574). For a dis-

cussion as to the proper construction of a conveyance by a grantor in a trust deed, who has reserved therein a power of control and disposition, and who also owned an undivided interest in the property, see *Gulf Red Cedar Co. v. O'Neal*, 131 Ala. 117 (30 So. Rep. 466; 90 Am. St. Rep. 22).

Sec. 119. Recitals in deeds—Force and effect. A recital in a deed of conveyance that it is subject to certain mortgages, described therein, is notice to all persons claiming through or under such deed of such facts as might be ascertained reasonably by investigation of the record and following up the information imparted thereby. Where a mortgage is of record which might reasonably be taken to be one of those referred to in such recital, one claiming through the deed is bound to inquire, and cannot avoid such duty because of an error in the description, which renders it somewhat doubtful what tract is intended. *Carter v. Leonard*, Neb. (91 N. W. Rep. 574). A bare recital in a deed that the grantor had previously executed and delivered his deed to the same property, which he was informed had been lost without stating to whom the former deed had been made, does not create a presumption that it was executed to the grantee in the later deed, but he takes the property charged with notice that the former deed was to another and that his grantor had no title. *Wagoner v. Dodson*, 96 Tex. 415 (73 S. W. Rep. 517). The court say: "What is the effect of such a deed? The recital is evidence against all parties to the instrument as well as those claiming under it. It states a fact which shows that Hornsby had previously parted with his title, and then had none to convey. If such previous conveyance was to another person than Shaw, such other person had the title and Shaw got none. If the first conveyance was to Shaw, it, and not the last, invested him with the title. The title of Shaw and all persons claiming through him, therefore, depended upon the answer to the question, to whom was the first deed executed? This the deed does not answer, unless the presumption is to be indulged that the recited conveyance was made to the grantee named in the second. We know of no principle which authorizes such a presumption. The parties agreed to their own instrument and the recitals in it. It contains no express intimation that Shaw was the grantee in the original instrument, or had succeeded to his rights. The only proper conclusion from the omission is that the maker of the instrument did not intend

to commit himself to a determination and declaration that Shaw had acquired title under the previous conveyance. In such an instrument a recital that it was made to supply the loss of a former one under which Shaw had title would naturally be expected, if such were the fact. Many instruments containing such recitals may be found, but a somewhat extended research has not brought to our attention such a one as that in question, and we cannot hold that it has the same effect as if it contained recitals which we must assume were intentionally omitted. If the recital had been of an instrument creating a prior mortgage, lease, or other estate less than the fee, it would hardly be contended that the presumption would arise that Shaw was the grantee therein. *Farrow v. Rees*, 4 Beav. 18. Such a recital would show an estate still in the grantee, subject to his power to convey, and hence there would be less apparent inconsistency between the recital and the attempt to convey than there is in this conveyance. But the recital in question does not undertake to determine the rights existing under the prior conveyance, the grantor leaving that question open to be determined by other evidence; and hence there is no real inconsistency. If the parties claiming under this deed were plaintiffs in trespass to try title, would they, under it alone, after showing title in *Hornsby*, establish title sufficient to enable them to recover? We think not, for the reason that their own evidence would disclose an elder title outstanding under *Hornsby*, with which they would not appear to be connected. We have found no authority exactly in point, but there are some which involve the same doctrine. In *Maxwell Land-Grant Co. v. Dawson*, 151 U. S. 586 (14 Sup. Ct. Rep. 458; 38 L. Ed. 279), plaintiff in ejectment relied on a deed which conveyed a large tract, excepting 'parts thereof, which the grantors have heretofore sold and conveyed.' The tract sued for was a part of the larger tract, but the plaintiff did not show that it had not been previously sold, and it was held that it could not recover, as it had failed to show title to the land sued for. The same ruling was made in a number of other decisions. *Corinne Co. v. Johnson*, 156 U. S. 576 (15 Sup. Ct. Rep. 409; 39 L. Ed. 537); *Reusens v. Lawson*, 91 Va. 254 (21 S. E. Rep. 347); *Cox v. McClure*, 71 Conn. 733 (43 Atl. Rep. 310); *Harman v. Stearns*, 95 Va. 71 (27 S. E. Rep. 601); *Stockton v. Morris*, 39 W. Va. 442 (19 S. E. Rep. 531). In these cases the deeds passed title only to land not previously conveyed, and hence the plaintiffs in order to show that

the conveyance passed the lands sued for, were required to show that they had not been previously sold. In the present case it may be said that the deed purports to convey the whole of the tract, and that herein is the distinction. But the grantor was careful to recite that he had previously conveyed, thereby showing that he then had no title, and the result is that a party claiming under the deed does not establish title until in some way he obviates the difficulty thus presented. The recital prevents the deed from operating against the prior conveyance. The case would, doubtless, be different if the deed had recited another to Shaw or to some one else whose title Shaw had obtained. The recital would not then leave the case open to the question as to who held the title already conveyed. If the party relying on such a deed proved the former conveyance, he would take under it; if he did not prove it, he would take under the last deed, there being nothing in its recitals to destroy its effect as evidence of complete title. *Boyce v. Stambaugh*, 34 Mich. 348."

Sec. 120. Exceptions and reservations. A deed otherwise valid is not rendered invalid by reason of an attempted exception of a part of the land conveyed being void for uncertainty. *Bromberg v. Smee*, 130 Ala. 601 (30 So. Rep. 483). A clause in a deed following the descriptive part "saving and preserving, however, from the operation hereof, the road running along the southerly line of said parcels," does not operate as an exception of the road, but merely reserves an easement therein in the grantor, where the terms of the deed were broad enough to include in it the road which was used by the grantor in passing to and from other lands belonging to him. *Bolio v. Marvin*, 130 Mich. 82 (89 N. W. Rep. 563). Riparian owners may, in a grant of a part of the riparian land, reserve a right to the use of the riparian water; and a reservation in such a case of so much water "as may be necessary to supply and work continuously a number 5 hydraulic ram" is not void for uncertainty, the amount being determinable by calculation; nor is the right given by such reservation lost by nonuser of the water. *Walker v. Lillingston*, 137 Cal. 401 (70 Pac. Rep. 282). A reservation by a grantor of "the building * * * known as the chapel, together with the right to the land on which said building stands, said building to remain as long as the association * * * may want it," reserves an estate in fee, determinable upon the association using the chapel ceasing

to want it for chapel purposes, and passes all the lot of land enclosed about the chapel by visible fences. *Weed v. Woods*, 71 N. H. 581 (53 Atl. Rep. 1024).

Sec. 121. Restrictions on alienation and liability for debts. A clause in a deed granting an estate in fee simple, exempting it from all debts of the grantee, is void. *Ricks v. Pope*, 129 N. C. 52 (39 S. E. Rep. 638). In construing a condition in a deed that the "grantee shall not mortgage, incur, or convey all or any part of said real estate within a period of twenty years from this date; and if said grantee does mortgage, incur, or convey such real estate within said time, then the same shall be forfeited, and shall go in fee simple to her children now living," it is held that a forfeiture arising from a mortgage of part of the premises is limited to the part mortgaged; and that the condition against incumbrances is limited to incumbrances voluntarily placed on the land by the grantee; hence no forfeiture arises from an execution or tax sale of the premises. *Fouts v. Millikan*, 30 Ind. App. 298 (65 N. E. Rep. 1050). The court say: "Applying the well-settled rule that a construction of the language used that will work a forfeiture must be rejected, as not within the intention of the parties, if the language is susceptible of a construction that will prevent a forfeiture, we cannot extend the effect of mortgaging a part of the land to all the land conveyed by the *Deardorff* deed. When the clause is construed as a whole, it must be held to mean that the extent of the forfeiture shall be limited to such land as is mortgaged, incumbered, or conveyed. See *Jackson v. Silvernail*, 15 Johns. 278; *Jackson v. Harrison*, 17 Johns. 66. We cannot extend the language of the deed, which directs that the grantee shall not mortgage, incur, or convey the land, so that it will include a lien not voluntarily placed upon the property by the grantee. The lien for taxes created by law, and the procurement of a judgment against the grantee, followed by a sale of the land, are not incumbrances, within the meaning of the deed. This doctrine has often been declared in insurance cases. See *Insurance Co. v. Pickle*, 119 Ind. 155 (21 N. E. Rep. 546; 12 Am. St. Rep. 393); *Baley v. Insurance Co.*, 80 N. Y. 21 (36 Am. Rep. 570); *Green v. Insurance Co.*, 82 N. Y. 517; *Insurance Co. v. Vanlue*, 126 Ind. 410 (26 N. E. Rep. 119; 10 L. R. A. 843); *Lodge v. Insurance Co.*, 91 Ia. 106 (58 N. W. Rep. 1089); *Hosford v. Insurance Co.*, 127 U. S. 404 (8 Sup. Ct. Rep.

1199; 32 L. Ed. 198). The question is upon the meaning of the term 'incumber,'—whether by that term the clause in the deed was meant to have effect against incumbrances created by law, as it would have against incumbrances created by the act or with the consent of the grantee. We think the better reasoning supports the construction that the word 'incumbrance' has no reference to such liens as may be created by law, but that it has reference only to such incumbrances as the grantee should voluntarily place upon the land. Should the grantee confess judgment or suffer a sale of the land upon a lien for the purpose of evading the condition, a different question would be presented. But as the grantor did not make it a part of the condition that the land should not pass by operation of law, which might have been plainly expressed, we cannot say that the grantor intended anything more by the use of the word 'incumber' than some voluntary act on the part of the grantee. In *Pym v. Lockyer*, 12 Sim. *394, a testator directed that the dividends of a fund should be paid to a grandson for life, but if he 'assigned' or 'otherwise disposed of' the same, or any part thereof, they were to go over. Held, that the grandson being in prison, and charged in execution for debt, the creditor was entitled to an order vesting the dividends of the fund in the provisional assignee of the insolvent debtor's court. In *Goodbehere v. Bevan*, 3 Maule & S. 358, a lessee covenanted not to 'assign the indenture,' 'or assign, set or underlet' the premises, or any part thereof, without the lessor's written consent, with a proviso that, if the lessee should part with his or their interest, contrary to his covenant, the lessor might re-enter. Afterwards the lessee deposited the lease as security for money, became bankrupt, and the lease was sold to pay the debt. It was held that the assignees, under a commission of bankruptcy, might assign the lease to the vendee without the consent of the lessor. See *Brandon v. Robinson*, 18 Ves. 429. In *Crusoe v. Bugby*, 2 W. Bl. 766, it was held that a covenant not to 'assign, transfer, or set over, or to otherwise do or put away,' the lease or premises, did not extend to an underlease for part of the term. In *Hargrave v. King*, 40 N. C. 430, a condition in a lease for life or for years that the lessee was to sell or transfer 'this lease, under forfeiture of the same,' did not prevent the lessee from making a sublease. In *Mitchinson v. Carter*, 8 Term R. 57, where a lessee covenanted not 'to let,* sell, assign, transfer, make over, barter, exchange, or otherwise part' with the indenture or the lands demised, with

a proviso that if he should 'let, set, assign, transfer, or make over' the premises, the landlord might re-enter, it was held that a warrant of attorney to confess judgment, on which the lease was taken in execution and sold, was not a forfeiture of the lease. But if the warrant of attorney to confess judgment was for the express purpose of enabling the creditor to take the lease in execution, the landlord might recover the premises from a purchaser under the sheriff's sale. *Mitchinson v. Carter*, 8 Term R. 300. Where property was given with a condition for forfeiture and a gift over in case of alienation, giving a power of attorney to confess judgment was not such alienation as worked a forfeiture, if not given for the purpose of evading the restraint. *Avison v. Holmes*, 1 Johns. & H. 530. In *Lear v. Leggett*, 1 Russ. & M. 690, it was held that bankruptcy did not work a forfeiture of the bequest of stock in trust for one's life, and after his death to his children, with a proviso that the life interest should not be subject to any alienation or disposition by sale, mortgage, or otherwise, in any manner whatsoever, and in case he should charge, or affect a charge, affect, or incumber the same, his life interest should be forfeited, and the stock go to those next entitled; the bankrupt's interest in such case passing to his assignees. In *Rex v. Robinson*, Wightw. 386 (12 Rev. Reports, 739), a will directed the payment of an annuity to a son, with a proviso that if the son should 'sell, assign, transfer, or make over, devise, mortgage, charge, or otherwise attempt to alienate,' the annuity, or any part thereof, or should 'make, do, and execute, or cause or procure to be made, done, and executed, any act, deed, matter or thing whatsoever to charge, alienate, or affect' the same, it should thereupon be suspended. It was held that the words used required a positive act to be done by the annuitant, and that the annuity was not forfeited by the outlawry of the annuitant."

Sec. 122. Restrictions as to use of granted premises.

A grantee of a lot with notice of a previous contract by his grantor with the owner of an adjoining lot, that he will not use the lot for the sale of intoxicating liquors or convey it without a restriction in the deed against its use for that purpose, is bound by such contract, though no such restrictive clause was placed in the deed, and the original agreement was not made under such circumstances as to create a covenant running with the land. *Sullivan v. Kohlenberg*, 31 Ind. App. 215 (67 N. E.

Rep. 541). A restriction in a deed by a grantor conveying a small portion of his lot to an adjoining owner and the right to use a wall as a party wall for the erection of a building, that such building shall not be used for a saloon, is removed by the grantor subsequently executing a quit claim deed for all of his lot to the same grantee without any reservation as to the building restriction. *Uihlein v. Matthews*, 172 N. Y. 154 (64 N. E. Rep. 792).

Sec. 123. Restrictions as to erection of buildings—
Building lines. Building restrictions may be established by a plat of land laying it out into blocks and lots, and become binding upon subsequent grantees of the lots without being expressly stipulated in the conveyances. *Simpson v. Mikkelsen*, 196 Ill. 575 (63 N. E. Rep. 1036). See opinion for particular plat held to establish such a restriction. Stipulations in a deed of a city lot imposing certain restrictions on the height and dimensions of the L of "the house to be erected upon said lot," does not create such an easement in favor of an adjoining lot as will entitle him to insist that no different building should ever be erected on the lot conveyed. *Boston Baptist Social Union v. Trustees of Boston University*, 183 Mass. 202 (66 N. E. Rep. 714). A restriction against the erection of a hotel in a deed to a particular lot, inserted by the vendor of several lots forming part of the same plat, can not be enforced by his prior grantee of another lot, where it does not appear that there was any general scheme or understanding that the restriction as to hotels was to be common to all grantees, and was to be inserted in all deeds, or that each purchaser was to be burdened with his own and benefitted by the other covenants. *Hemsley v. Marlborough Hotel Co.*, 62 N. J. Eq. 164 (50 Atl. Rep. 14). The common grantor of several town lots which have been sold under a general scheme of improvement and conveyed with certain restrictions as to the erection of buildings can not invoke the aid of a court of equity to enforce them after his acquiescence for several years in the repeated violations of these restrictions by lot owners; and a remote grantee of such grantor can not specifically enforce such restrictions by requiring his neighbor to remove a building erected in violation thereof, where he acquiesced in its construction and has been guilty of a violation himself. *Ocean City Ass'n v. Headley*, 62 N. J. Eq. 322 (50 Atl. Rep. 78). Where the restrictions as to the character of the buildings to be erected upon property have

been expressly inserted in deeds, and it is claimed that there are additional restrictions as to the character of the buildings, created by parol, either by a general plan or otherwise, the evidence should be very clear, not only as to the existence of such restrictions, but that the purchasers had notice, before payment for the lands, that there was a claim for restrictions beyond those mentioned in the deeds. *Standard Land & Bldg. Co. v. Schanz*, N. J. Eq. (51 Atl. Rep. 620). A stipulation in a deed conveying property to a church, executed by one having no other property in that vicinity, "that no building or structure shall be built or erected on the land herein described and conveyed further east, or nearer A. avenue, that is the house or building directly south of said property," does not impose a restriction in favor of the property referred to as "directly south of said property" by reason of the fact that the same grantor had previously conveyed it by deed of gift to his daughter. *Hays v. St. Paul M. E. Church*, 196 Ill. 633 (63 N. E. Rep. 1040). The failure of some of the owners of lots to observe a building restriction established by a plat thereof is no defense to an action to compel another owner to observe the restriction. *Simpson v. Mikkelsen*, 196 Ill. 575 (63 N. E. Rep. 1036). Where a building line restriction excepts bay windows and piazzas, the erection of a semi-circular structure on the front part of a house extending beyond the line which is not clearly shown not to come within the exception, as a bay window, will not be enjoined at the suit of a lot owner who had himself erected a similar structure. *Sutcliffe v. Eisele*, 62 N. J. Eq. 222 (50 Atl. Rep. 69). For construction of particular restriction in deed fixing a building line, see *Best v. Nagle*, 182 Mass. 495 (65 N. E. Rep. 842).

Sec. 124. Cancellation of deed—Mental incapacity of grantor. Want of mental capacity will not be presumed because of old age or physical infirmities. *Chadd v. Moser*, 25 Utah, 369 (71 Pac. Rep. 870). Citing, *Delaplain v. Grubb*, 44 W. Va. 612 (30 S. E. Rep. 201; 67 Am. St. Rep. 788); *Dickerson v. Evans*, 84 Ill. 451; *Orr v. Pennington*, 93 Va. 268 (24 S. E. Rep. 928); *Sullivan v. Hodgkin*, (Ky.) 12 S. W. Rep. 773; *Crowe v. Peters*, 63 Mo. 429; *Shea v. Murphy*, 164 Ill. 614 (45 N. E. Rep. 1021; 56 Am. St. Rep. 215); *Davis v. Latta*, 94 Ia. 727 (62 N. W. Rep. 17). A conveyance of lands, obtained for a grossly inadequate consideration, by unfair advantage taken of great mental weakness, though not amount-

ing to absolute incapacity, of the grantor, will, in equity, be set aside, on equitable terms, when application therefor is made seasonably by the grantor, his representatives or heirs. *Walling v. Thomas*, 133 Ala. 426 (31 So. Rep. 982). See opinion for particular laches held not to preclude a cancellation. A conveyance executed by one shown to have been capable of comprehending and acting intelligently upon the business affairs out of which it grew, and of understanding its effect, is not rendered invalid by the fact that at the time of its execution he was subject to monomaniacal delusions on other matters. *Seawel v. Dirst*, 70 Ark. 166 (66 S. W. Rep. 1058). The court say: "While it may have formerly been the doctrine of the courts that an insane person could do no legal or binding act, that dogma has been long overthrown. The law now recognizes the fact, well established by the investigation and observation of medical experts, that there may be derangement of mind as to particular subjects, and yet capacity to comprehend and intelligently act on other subjects. It follows, therefore, that the proof which is designed to invalidate a man's deed or contract on the ground of insanity must show inability to exercise a reasonable judgment in regard to the matter involved in the conveyance. The fact that the grantor was a monomaniac, and possessed of insane delusions on some subjects not connected with the conveyance or the matters out of which it grew, is not sufficient to invalidate his deed. To have that effect, the insanity must be such as to disqualify him from intelligently comprehending and acting upon the business affairs out of which the conveyance grew, and to prevent him from understanding the nature and consequences of his act. *Busw. Isan.* § 270; *Burgess v. Pollock*, 53 Ia. 273 (5 N. W. Rep. 179; 36 Am. Rep. 218); *Elwood v. O'Brien*, 105 Ia. 239 (74 N. W. Rep. 740); *Concord v. Rumney*, 45 N. H. 428; *Aldrich v. Bailey*, 132 N. Y. 85 (30 N. E. Rep. 264); *Kingsbury v. Whitaker*, 32 La. Ann. 1055 (36 Am. Rep. 278); *Banks v. Goodfellow*, L. R. 5 Q. B. 549; *Bish. Cont. (Enlarged Ed.)* 962, 964; 16 Am. & Eng. Enc. Law (2d Ed.) 624, and cases cited."

For particular fact cases as to sufficiency of evidence to set aside a deed on account of grantor's mental incapacity, see *Chidester v. Turnbull*, 117 Ia. 168 (90 N. W. Rep. 583); *Bennett v. Bennett*, Neb. (91 N. W. Rep. 409); *Phelan v. Hyland*, 197 Ill. 395 (64 N. E. Rep. 360); *Vinson v. Scott*, 198 Ill. 144 (65 N. E. Rep. 76); *Apland v. Pott*, S. Dak. (92 N. W. Rep. 19); *Dean v. Dean*, 42 Or. 290 (70 Pac. Rep.

1039); *Wilson v. Jackson*, 167 Mo. 135 (66 S. W. Rep. 972); *Chadd v. Moser*, 25 Utah, 369 (71 Pac. Rep. 870); *Stringfellow v. Hanson*, 25 Utah, 480 (71 Pac. Rep. 1052). For cases determining particular questions as to admissibility of evidence in action to set aside deed on account of grantor's mental incapacity, see *Hersey v. Hutchins*, 71 N. H. 458 (52 Atl. Rep. 862); *Sargent v. Burton*, 74 Vt. 24 (52 Atl. Rep. 72).

Sec. 125. Cancellation of deed—Fraud or undue influence. The right to cancel a deed for fraud may be lost by the complainant's failure to act with reasonable diligence. *Dean v. Oliver*, 131 Ala. 634 (30 So. Rep. 865). Where one who was the confidential adviser of a widow and the executor of her husband's will purchases land with the proceeds of a life insurance policy of the husband made payable to the wife, and causes the same to be conveyed to her for life with remainder to her children, she supposing that she was getting the fee, the transaction will be set aside as a constructive fraud on her, and her title established, although such conveyance was prompted by a desire to protect her. *Lampman v. Lampman*, 118 Ia. 140 (91 N. W. Rep. 1042). Influence, to be undue, must be such as, in effect, destroys the free agency of the person acted upon, and substitutes the will of another person for his own. *Reeves v. Howard*, 118 Ia. 121 (91 N. W. Rep. 896). For particular fact cases illustrative of the sufficiency of evidence to set aside a deed for fraud, see *Wilson v. Jackson*, 167 Mo. 135 (66 S. W. Rep. 972); *Lockwood v. Allen*, 113 Ia. 474 (89 N. W. Rep. 492); *Hayes v. Harriman*, 117 Wis. 132 (92 N. W. Rep. 1100); *Cutler v. Roanoke R. R. & Lumber Co.*, 128 N. C. 477 (39 S. E. Rep. 30); *Huntley v. Welsh*, 64 S. C. 233 (41 S. E. Rep. 980); *Pinkston v. Boykin*, 130 Ala. 483 (30 So. Rep. 398); *Dashner v. Buffington*, 170 Mo. 260 (70 S. W. Rep. 699). Same, as to undue influence, *Fitzpatrick v. Weber*, 168 Mo. 562 (68 S. W. Rep. 913); *Reeves v. Howard*, 118 Ia. 121 (91 N. W. Rep. 896); *Haynes v. Harriman*, 117 Wis. 132 (92 N. W. Rep. 1100); *Keller v. Lamb*, 202 Pa. St. 412 (51 Atl. Rep. 982); *Chadd v. Moser*, 25 Utah, 369 (71 Pac. Rep. 870); *Stringfellow v. Hanson*, 25 Utah, 480 (71 Pac. Rep. 1052); *Carter v. Dilley*, 167 Mo. 564 (67 S. W. Rep. 232); *Ryan v. Ryan*, 174 Mo. 279 (73 S. W. Rep. 494); *Highland v. Highland*, (Ky.) 73 S. W. Rep. 791 (24 Ky. Law Rep. 2242).

Sec. 126. Cancellation of deed—Deed procured by fraudulent representations as to use to be made of property. Where several owners of residence property in the same locality have made an oral agreement among themselves not to sell their properties to objectionable persons or to be used for business or other purposes which would detract from the desirability of the locality as a residence, and one of their number has been induced to convey his property to an attorney by the latter falsely representing that he was purchasing as agent for a third person to be used by him for a residence, when in fact he was procuring the title to convey to another to whom he conveyed the property and to whom such grantor had refused to sell the property and who was purchasing it to be used for a boarding house, such grantor may have both deeds canceled for fraud, though he received full consideration and suffered no personal financial loss from the fraud. *Brett v. Cooney*, 75 Conn. 388 (53 Atl. Rep. 729). The court say: "Fraudulent representations constitute no ground for equitable relief unless made to one who was induced by them to act to his injury. *Barnes v. Starr*, 64 Conn. 136, 150 (28 Atl. Rep. 980). But in measuring injury equity does not concern itself merely with money losses. If it finds that a clear right has been invaded, and that redress can be secured by putting the parties back in their original position, it will seldom refuse its aid because the plaintiff can show no substantial damage to his pecuniary interests. The oral understanding between the neighbors on Beach street that they would not sell for such a purpose as that for which Mrs. Cooney sought title would have furnished no ground for an action by any one against the plaintiffs, had they knowingly sold to her. But it put them under an honorary obligation, which may properly be taken into account in determining whether a case has been made out for equitable relief. The only persons who would suffer a substantial pecuniary loss, were these deeds allowed to stand, would be those owning residences in the neighborhood of the property conveyed. They, however, could maintain no action against the defendants. Unless the plaintiffs can sue, no one can. Good faith and honorable feeling between man and man called upon them, therefore, to endeavor to retrace the steps which they had unwittingly taken to their neighbors' prejudice. They may be regarded, in a certain sense, as occupying a fiduciary relation as to their right of action, and the damage to others may be considered as bearing on their own equity to relief.

They stand in this respect in no worse position than if they had insisted on the insertion in the habendum clause of the deed to Martin of a limitation to the use of Coyle. In that case they would have suffered no greater damage had Martin conveyed to Mrs. Cooney. In that case the neighbors could only have gained protection against pecuniary loss through some act like this. The plaintiffs are not trustees of their interests. They were under no legal duty, and perhaps under no equitable duty, to sue for their protection. But, since they have sued, they are entitled to claim the benefit of that favorable regard which naturally attaches to acts done from a just sense of moral obligation. What honor and good faith require a man to ask of a court of equity for the profit of others will not be refused without strong cause.

"The judgment properly declared both deeds under which Mrs. Cooney claims title to be void, and ordered the paper title held under them to be reconveyed. The deed from the plaintiffs to Martin they could avoid, since it rested on no contract of sale, and was given because they were deceived into believing that there was such a contract between them and Coyle, of which it was a proper execution. That from Martin to Mrs. Cooney they were entitled to have set aside because it was given in pursuance of a fraudulent conspiracy in prejudice of their rights to dispose of their property according to their own will and their own sense of neighborly obligation."

Sec. 127. Cancellation of deed between persons occupying fiduciary relations. A presumption of undue influence sufficient to overthrow its validity arises, where there is no evidence to overcome it, in case of deed by an aged parishoner to the pastor of his parish, to whose influence he was shown to have been susceptible and who had opportunity to use such influence, conveying property to be held in trust by him for such parish, greatly in excess of its needs, and in addition to previous liberal gifts, and contrary to the grantor's intentions expressed both before and after the conveyance. *Good v. Zook*, 116 Ia. 582 (88 N. W. Rep. 376). The fact that a voluntary conveyance is made from father to son while the father is residing in the son's family, even though the conveyance deprives other children of their proportionate share in the father's property, is not presumptively fraudulent, and will not throw on the grantee the burden of proving the want of undue influence. *Chidester v. Turnbull*, 117 Ia. 168 (90 N. W.

Rep. 583). The relation of brother and sister, both of mature age, living in separate homes, with no special dependence of either upon the other, is not such as will taint any gift or transfer of property between them with a presumption of fraud. *Reeves v. Howard*, 118 Ia. 121 (91 N. W. Rep. 898). The mere fact that parties are tenants in common of land and also brother and sister, does not of itself establish such a fiduciary relation as will cast on the brother the burden of showing that a conveyance to him by his sister of her interest in the land was fair, reasonable, and for an adequate consideration. *Albright v. Hunecke*, 196 Ill. 127 (63 N. E. Rep. 616). See opinion for particular facts held insufficient to show that the execution of such a conveyance was procured by undue influence.

Sec. 128. Cancellation of deed—Return of consideration—Jurisdiction of equity to put plaintiff in possession.

A grantor seeking the cancellation of a deed held in escrow, on account of delivery thereof having been procured by fraud, must return whatever of the consideration he has received. *Rubie Combination Gold Min. Co. v. Princess Alice Gold Min. Co.*, 31 Colo. 158 (71 Pac. Rep. 1121). An offer to return the consideration is not required where a bill for the cancellation of a conveyance shows that the use of the land during the defendant's possession has been of greater value than the consideration he paid. *Walling v. Thomas*, 133 Ala. 426 (31 So. Rep. 982). Where a grantee has notice of the grantor's incapacity to manage his property and delivers to the latter money or property in exchange for lands, and the money or property is lost or squandered, or if it appears the grantee intended to defraud such grantor out of the property, a court of chancery may set aside the sale without requiring the consideration to be restored. *Hardy v. Dyas*, 203 Ill. 211 (67 N. E. Rep. 852). In Illinois it is held that a court of equity decreeing the cancellation of a conveyance can not award the plaintiff a writ of assistance to put him into possession, but it must leave him to pursue his remedy at law to obtain possession. *Clay v. Hammond*, 199 Ill. 370 (65 N. E. Rep. 352; 93 Am. St. Rep. 146).

Sec. 129. Quitclaim deeds—Passing of covenants by.

A quitclaim deed passes the grantor's covenant of seizin and warranty in his title which runs to him and his assigns. *Johnson v. Johnson*, 170 Mo. 34 (70 S. W. Rep. 241; 59 L. R. A. 749). The court say: "In principle there would seem to be

but little difference in this respect between a quitclaim deed and a deed of a special master under a decree of foreclosure and sale, which conveys only the right, title, and interest of the defendant mortgagor. Both conveyances pass the same estate in extent,—that is, whatever the grantor or mortgagor has, whether it be fee simple, life estate, or remainder; and in a case involving such a special master's deed we held that the right of inurement which a railroad company would have enjoyed passed to the grantee in the master's deed. *Fordyce v. Rapp*, 131 Mo. 354 (33 S. W. Rep. 57). In *Jenks v. Quinn*, 137 N. Y. 223 (33 N. E. Rep. 376), a covenant to pay an existing mortgage in a deed of conveyance was held to run with the land, and to pass to a subsequent grantee under an ordinary quitclaim deed; and a similar ruling was made in *Hunt v. Amidon*, 4 Hill, 345 (40 Am. Dec. 283), and also in *Beddoe's Ex'r v. Wadsworth*, 21 Wend. 120, upon the theory that a quitclaim deed is, in effect, an assignment of the covenants. A like conclusion was announced in *Saunders v. Flaniken*, 77 Tex. 662 (14 S. W. Rep. 236), and in *Powers v. Patten*, 71 Me. 583; the court there saying: "They [the covenants] were part and parcel of his right, title, and interest in the land. He assigned and sold all his rights and interests. Such a description would certainly be effectual as a mere deed of release, and covenants of warranty may descend, through the operation of deeds that are mere naked releases, indefinitely from party to party. *Wilson v. Widenham*, 51 Me. 566; *Brown v. Staples*, 28 Me. 497 (38 Am. Dec. 504)." And accordingly it was ruled that the after-acquired title inured to the person holding under the first grantee, however remote from him in the line of title, and that the succession was not broken by an intervening deed, which conveyed only the grantor's right, title, and interest in the land."

Sec. 130. Quitclaim deeds—Outstanding equities—Charging grantee with notice of. Applying *Burns' Ind. Rev. Stat.*, § 3349, it is held that one taking a mortgage the granting words in which are "mortgage and warrant," is not deprived of the character of an innocent purchaser by reason of the fact that his mortgagor took title to the premises by a quitclaim deed. *Rinehardt v. Reifers*, 158 Ind. 675 (64 N. E. Rep. 459). A mortgagee is not charged with notice of an outstanding equity against his mortgagor's estate by reason of the conveyance of land to him being by quitclaim deed. *Bab-*

cock v. Wells, R. I. (54 Atl. Rep. 596). The court say: "Doubtless it is true that quitclaim deeds are often obtained for speculative purposes, but the test of their effect is the fact of a purchase in good faith, without notice of a defect in title. As Mr. Justice Field said in *Moelle v. Sherwood*, 148 U. S. 21 (13 Sup. Ct. Rep. 426; 37 L. Ed. 350): 'The character of a bona fide purchaser must depend upon attending circumstances or proof as to the transaction, and does not arise, as often, though we think inadvertently, said, either from the form of the conveyance, or the presence or the absence of any accompanying warranty.' In *Flagg v. Mann*, 2 Sumn. 486 (Fed. Cas. No. 4847), Judge Story held that a quitclaim deed, where the circumstances showed that it was not intended to operate merely by way of passing a right or by way of extinguishment, was to be treated as a bargain, and sale, or other lawful conveyance, saying 'It ordinarily affords very conclusive proof that the purchase is of the whole estate, and not of the mere right or title of the party, whatever it may be.' See, also, *United States v. California Land Co.*, 148 U. S. 31 (13 Sup. Ct. Rep. 458; 37 L. Ed. 354); *Stark v. Bounton*, 167 Mass. 443 (45 N. E. Rep. 764); *Smith v. McClain*, 146 Ind. 77 (45 N. E. Rep. 41); *Bennett v. Davis*, 90 Me. 457 (38 Atl. Rep. 372); *Schott v. Dosh*, 49 Neb. 187 (68 N. W. Rep. 346; 59 Am. St. Rep. 531); *White v. McGarry* (C. C.), 47 Fed. Rep. 420."

Sec. 131. Miscellaneous notes. By the express provisions of Ala. Code, § 2170, a deed made and delivered on Sunday is void. *Williams v. Armstrong*, 130 Ala. 389 (30 So. Rep. 553). A conveyance of real estate otherwise legal is neither void nor revocable because it is subject to a life estate in the grantor, the payment of his debts, expenses of his last illness and funeral, and certain bequests. *Powers v. Scharling*, 64 Kan. 339 (67 Pac. Rep. 820). The omission from a deed by a father to his son of a reservation in favor of another son of the right to the rents and profits of the property for life, which right it was clearly understood between the parties to the deed he should have, is a fatal omission and authorizes the setting aside of the deed. *Collins v. Collins*, 63 N. J. Eq. 602 (52 Atl. Rep. 1115).

FORM OF DEEDS.

[In Vol. I, §§ 57-105; Vol. II, §§ 133-147; Vol. III, §§ 181-197; Vol. IV, §§ 156-168; Vol. V, §§ 162-179; Vol. VI, §§ 190-211; Vol. VII, §§ 147-164; Vol. VIII, §§ 155-177; Vol. IX, §§ 146-162, will be found a compilation of the statutory forms of deeds and acknowledgments for the several states and territories. Below we give such additional amendments, changes and constructions as have been made.]

Sec. 132. Alabama.

(See Vol. I, § 57; Vol. II, § 133; Vol. III, § 181; Vol. V, § 162; Vol. VII, § 147; Vol. VIII, § 155; Vol. IX, § 146.) A certificate of acknowledgment made in another state before an officer styling himself "chancery clerk" and "ex officio notary public" which bears no notarial seal is not sufficient to authorize the admission of the deed in evidence; but the signature of such officer may operate as an attestation of the deed so as to authorize proof of its execution. *Hayes v. Banks*, 132 Ala. 354 (31 So. Rep. 464). The fact that the attorney of a mortgagee drew up the mortgage and superintended its execution, and that it contained a stipulation for attorney's fees, does not disqualify such attorney as a witness to the mortgagor's signature. *Chastain v. Porter*, 130 Ala. 410 (30 So. Rep. 492; 89 Am. St. Rep. 17).

Sec. 133. Arizona.

(See Vol. I, § 58.) Acknowledgments valid according to law of place where deed was executed are validated by Laws 1903, p. 56.

Sec. 134. Arkansas.

(See Vol. I, § 59; Vol. II, § 134; Vol. III, § 182; Vol. IV, § 156; Vol. V, § 163; Vol. VI, § 190.) For statute validating deeds executed since Mar. 18, 1887, and which are invalid on account of sec. 1 of the act of that date entitled "An act to render more effectual the constitutional exemptions of homesteads," see Laws 1903, p. 150.

Sec. 135. Colorado.

(See Vol. I, § 61; Vol. III, § 184; Vol. VI, § 191.) For statute validating acknowledgments, see Laws 1903, p. 371, amending Mills Ann. Stat., § 3285. Colorado has enacted a statute providing a system for the registration of land titles. Laws 1903, pp. 311-352.

Sec. 136. Connecticut.

(See Vol. I, § 62; Vol. IV, § 158; Vol. V, § 165; Vol. VI, § 192; Vol. VIII, § 157.) For statute validating certain acknowledgments, see Laws 1903, p. 187, § 6.

Sec. 137. Georgia.

(See Vol. I, § 66; Vol. II, § 137; Vol. III, § 186; Vol. IV, § 159; Vol. VI, § 193; Vol. VII, § 149; Vol. VIII, § 159; Vol. IX, § 148.) Georgia has appointed a commission to investigate "the various systems proposed for the registration of land titles." Laws 1903, p. 689.

Sec. 138. Illinois.

(See Vol. I, § 68; Vol. IV, § 160; Vol. V, § 167; Vol. VII, § 151; Vol. VIII, § 161; Vol. IX, § 149.) An acknowledgment or proof of execution taken out of the state, but within the United States, before a notary public, United States commissioner, or commissioner of deeds, and certified under his seal of office, is sufficient. Laws 1903, p. 119. Laws 1897, p. 139 construed and applied—Torrens system of land transfers—application by corporation—pleading and practice. *Gage v. Consumers' Electric Light Co.*, 194 Ill. 30 (64 N. E. Rep. 653). For act amending and extending Torrens system of land transfers, see Laws 1903, p. 121.

Sec. 139. Minnesota.

(See Vol. I, § 78; Vol. IV, 162; Vol. V, § 171; Vol. VI, § 195; Vol. VIII, § 164.) Minn. Laws 1901, ch. 237, providing for the Torrens system of registering land titles, is not unconstitutional in that it is special legislation; nor in that it deprives the owner of his interest in land without due process of law; nor in that it violates article 3 of the constitution, vesting the powers of government in three distinct departments; nor that examiners of title provided for by the act are appointed by the court, and not elected as county officers are required to be by section 4, art. 11, Const. *State v. Westfall*, 85 Minn. 437 (89 N. W. Rep. 175; 57 L. R. A. 297; 89 Am. St. Rep. 571). For statutes validating defective deeds, mortgages, etc., see Laws 1903, pp. 270, 320, 334, 706.

Sec. 140. New Jersey.

(See Vol. I, § 85; Vol. IV, § 163; Vol. V, § 173; Vol. VI, § 199; Vol. IX, § 153.) Acknowledgments out of the state and within the United States may be taken "before or by any officer in any such state of the Union, territory thereof, or District of Columbia, then residing, and being anywhere in such state, territory or district, authorized at the time of such proof or acknowledgment by the laws of such state, territory or district, to take the proofs and acknowledgments of deeds or conveyances of lands, tenements or hereditaments, lying and being in such state, territory or district," provided the official character of the officer and his authority to take the acknowledgment is attested under certificate bearing the great seal of the state or territory or some court of record therein. Laws 1903, p. 456. Deeds, except those by corporations, are not invalidated by absence of seal where attesta-

tion clause and the certificate of acknowledgment recite that same was signed and sealed by the maker thereof. Laws 1904, p. 203. For statute validating acknowledgments taken by commissioner of deeds after his term has expired, see Laws 1903, p. 232. Construing and applying N. J. Laws 1898, p. 685, § 39, providing that a wife's acknowledgment of a conveyance of any interest in lands must be made by her on a private examination apart from her husband, "that she signed, sealed and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of her husband," it is held that an officer can not properly refuse to certify a wife's acknowledgment to a conveyance of her husband's land on account of her stating to such officer that she did not execute it "freely," but declared that she executed it "without any fear, threats or compulsion of her husband," where it appears that the deed was being made in pursuance of a previous written contract entered into by the husband and wife to execute such a conveyance of the lands and which had been acknowledged by her without any equivocation. *Goldstein v. Curtis*, 63 N. J. Eq. 454 (52 Atl. Rep. 218).

Sec. 141. New York.

(See Vol. I, § 87; Vol. III, § 194; Vol. IV, § 164; Vol. VI, § 201; Vol. IX, § 154.) Subd. 5, § 249, ch. 547 of Laws 1896 (See Ballard's Law of Real Prop., Vol. IV, § 164) has been amended so as to read: "Any officer of the state in which the acknowledgment is taken authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein, of which the certificate required by § 262 shall be evidence." Laws 1903, p. 978.

Sec. 142. North Carolina.

(See Vol. I, § 88; Vol. III, § 195; Vol. VI, § 202; Vol. VII, § 157; Vol. IX, § 155.) A deed on which appears "Signed, sealed and delivered in the presence of M. & R., J. P.," and also the following: "Personally appeared before me H., clerk of the superior court R., who on oath says that he saw D sign a land deed on the 21st Oct., 1897; that he also signed the deed officially as a justice, and saw M. sign as witness," which was signed by R. & H., is inadmissible in evidence. *Brinkley v. Smith*, 131 N. C. 130 (42 S. E. Rep. 566). As to necessity of seal on deed by assignee of bankrupt, see *Westfeldt v. Adams*, 131 N. C. 379 (42 S. E. Rep. 823).

Sec. 143. North Dakota.

(See Vol. IV, § 165; Vol. V, § 174; Vol. VI, § 203; Vol. VII, § 158; Vol. VIII, § 168; Vol. IX, § 156.) Where an officer authorized to take acknowledgments also has authority to appoint a deputy, the acknowledgment or proof of instruments "may be taken by such deputy in the name of his principal, as deputy, or by such deputy as deputy." Laws 1903, p. 5.

Sec. 144. Ohio.

(See Vol. I, § 90; Vol. V, § 175; Vol. VI, § 204; Vol. VII, § 159.) In the absence of fraud and undue advantage, the witnessing of a mortgage, as required by Ohio Rev. Stat. 1892, § 4106, is not invalidated by the fact that the witnesses and the officer taking the acknowledgment of a mortgage executed to a corporation are stockholders therein. *Read v. Toledo Loan Co.*, 68 O. St. 280 (67 N. E. Rep. 729; 96 Am. St. Rep. 663).

Sec. 145. Oklahoma.

(See Vol. I, § 91; Vol. V, § 176; Vol. VIII, § 169.) Acknowledgments taken without the territory "may be taken before any notary public, clerk of a court of record, commissioner of deeds, duly appointed by the governor of the territory for the county, state or territory where the same is taken." Laws 1903, p. 134. This act also legalizes certain acknowledgments heretofore taken.

Sec. 146. Pennsylvania.

(See Vol. I, § 93; Vol. V, § 177; Vol. IX, § 158.) The governor of this state is authorized to appoint and commission women as commissioners of deeds in the several states, and they are authorized to take acknowledgments as such. Laws 1903, p. 105.

Sec. 147. South Dakota.

(See Vol. VI, § 161; Vol. VIII, § 171.) For act legalizing defective acknowledgments, see Laws 1903, p. 1.

Sec. 148. Texas.

(See Vol. I, § 98; Vol. II, § 143; Vol. III, § 196; Vol. V, § 178; Vol. VI, § 208; Vol. VII, § 163; Vol. VIII, § 173.) A certificate of a wife's acknowledgment, made on her separate examination, stating that she "acknowledged the same to be her free act and deed, and declared that she had willingly signed the same without fear or compulsion on the part of her husband and that she wished not to retract it," is sufficient, though not in the exact language of the statute, and not containing the words that she "had willingly signed the same for the purposes and consideration therein expressed." *Arnall v. Newcom*, 29 Tex. Civ. App. 521 (69 S. W. Rep. 92).

Sec. 149. Washington.

(See Vol. I, § 102; Vol. II, § 145; Vol. VI, § 210; Vol. VIII, § 175; Vol. IX, § 162.) "Certificates of acknowledgment of an instrument acknowledged by a corporation substantially in the following form shall be sufficient:

State of }
 County of } ss

On this — day of — A. D. 19—, before me personally appeared —, to me known to be the (president, vice president, secretary, treasurer, or other authorized officer or agent, as the case may be) of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of the said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

(Signature and title of officer)."

Laws 1903, p. 245.

DEFINITIONS.

EPITOME OF CASES.

Sec. 150. What will be treated as real estate—"Cultivated land" and "premises" defined. An embankment, ties and rails placed by a railroad on land belonging to it are a part thereof, and pass to its grantee. *Van Husan v. Omaha Bridge & T. Ry. Co.*, 118 Ia. 366 (92 N. W. Rep. 47). "Cultivated land" includes, not only land upon which crops are growing, but also land actually prepared and ready for a crop, and land which has been used for growing crops, and which the owner intends again to devote, in due season, to such use. *Bryce v. State*, 113 Ga. 705 (39 S. E. Rep. 282). For a discussion of the meaning of the word "premises," see *Sands v. Kaukauna Water Power Co.*, 115 Wis. 229 (91 N. W. Rep. 679).

DESCENT.

EPITOME OF CASES.

Sec. 151. Adopted children. Construing and applying Starr & C. Ann Ill. Stat., ch. 4, § 5, providing that, for the purpose of inheritance, an adopted child shall be "the child of the parents by adoption, the same as if he had been born to them in lawful wedlock," it is held that a child adopted by a testator after the execution of his will, in which no provision is made for such child, has the same rights, under ch. 39, § 10, as an after-born child occupying the same position. *Flannigan v. Howard*, 200 Ill. 396 (65 N. E. Rep. 782; 59 L. R. A. 664; 93 Am. St. Rep. 201). The adoption of a child, made under Neb. Gen. Stat. 1873, tit. 25, ch. 57, § 797, does not give it the right to inherit from the adopting parents in the absence of an affirmative statement to that effect in the statement made and filed by them with the county judge, or the use of language which clearly indicated the intention of the foster parents that the child should inherit. *Ferguson v. Herr*, 64 Neb. 649 (90 N. W. Rep. 625). A written contract of adoption of a child for a certain period of time, which does not give it the right to inherit from the persons adopting it, cannot be varied by proof of a parol agreement by the adopting father before the execution of the instrument of adoption that upon his death he would make the child his heir. *Brantingham v. Huff*, 174 N. Y. 53 (66 N. E. Rep. 620; 95 Am. St. Rep. 545).

Sec. 152. Half bloods—Bastards and children of slaves. In Rhode Island heirs of half blood inherit the same as those of the whole blood. *McNeal v. Sherwood*, 24 R. I. 314 (53 Atl. Rep. 43). A statute (Mo. Rev. Stat. 1899, § 2916) giving a bastard the right of inheriting and transmitting inheritance on the part of his mother, makes him capable of inheriting his deceased mother's share of her brother's estate. *Moore v. Moore*, 169 Mo. 432 (69 S. W. Rep.

278; 58 L. R. A. 451). S. Dak. Comp. Laws, § 3403, providing that "every illegitimate child is the heir of the person, who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child," confers the right of inheritance on a child who has been acknowledged by its father in accordance with the statute before its passage, though the father was a nonresident alien and did not know or intend that the instrument making such acknowledgment should have that effect. *Moen v. Moen*, S. Dak. (92 N. W. Rep. 13). In determining the right of a bastard to inherit from his father, claimed under a statute legitimating him, when the bastard has his domicile in one state and his father in another, the law of the father's state at the time of the legitimating act determines the status of both parties. *Va. Laws 1865-66*, p. 85; *Mass. Pub. Stat. 1882*, ch. 125, § 5, construed and applied. *Irving v. Ford*, 183 Mass. 448 (67 N. E. Rep. 366). Citing, *Lingen v. Lingen*, 45 Ala. 410; *Loring v. Thorndike*, 5 Allen, 257, 263; *Morris v. Williams*, 39 O. St. 554; *Blythe v. Ayres*, 96 Cal. 532 (31 Pac. Rep. 915; 19 L. R. A. 40). S. C. Laws 1864-65, p. 291 construed and applied—right of colored child of a slave mother by white man to inherit. *Lloyd v. Rawl*, 63 S. C. 219 (41 S. E. Rep. 312). *Shannon's Tenn. Code*, § 4179 construed and applied—right of children of slave marriages to inherit. *Carver v. Maxwell*, 110 Tenn. 75 (71 S. W. Rep. 752).

Sec. 153. Descent to surviving husband or wife—Statutes construed. A husband who has joined his wife in the execution of a mortgage on her land, in which he expressly agreed to pay the sum of money secured thereby, and to whom notice of proceedings to sell the land to pay such debt had been given, is precluded from claiming that the probate court has no jurisdiction to sell all the land thus mortgaged after the death of his wife intestate, although *Burns' Ind. Rev. Stat.*, § 2642 provides that "if a wife die testate or intestate, leaving a widower, one-third of her real estate shall descend to him, subject, however, to its proportion of the debts of the wife contracted before marriage." *Pearson v. Kepner*, 29 Ind. App. 92 (63 N. E. Rep. 38). For a discussion of the rights of a surviving husband in the real estate of his wife, in Indiana, see *Turner v. Heinberg*, 30 Ind. App. 615 (65 N. E. Rep. 294). Under *Burns' Ind. Rev. Stat.*, § 2651, upon the death of a husband leaving surviving

a widow, but no parent or child, she takes the whole of his estate both real and personal, although he may have left living brothers and sisters or the descendants of brothers and sisters. *Haugh v. Smelser*, 31 Ind. App. 571 (66 N. E. Rep. 55, 506). The right of a surviving wife to inherit from her husband under Burns' Ind. Rev. Stat., § 2652, does not give her any interest in lands of which her husband once held possession under an executory contract of purchase, but which were sold during his lifetime on proceedings brought against him without making the wife a party, by his vendor to foreclose a vendor's lien for the purchase price, and the husband surrendered possession to such purchaser. *Schaefer v. Purviance*, 160 Ind. 63 (66 N. E. Rep. 154). Land conveyed to a wife by an assignee of her husband, under an order of court, in consideration of her release of her inchoate interest in all his other realty and the cancellation of debts owing by him to her, is not held by her under a judicial decree, within the provisions of Horner's Rev. Stat. 1901, §§ 2508, 2510, so as to give her husband surviving her the right to inherit. *Willson v. Miller*, 30 Ind. App. 586 (66 N. E. Rep. 757). Under Ind. Rev. Stat. 1881, § 2487, a second or subsequent childless wife takes a fee in lands descending to her from her husband, and children of a former wife of the husband, upon the death of such second or subsequent childless wife, inherit such real estate as her forced heirs, but they have no present interest in such property. *Bateman v. Bennett*, 31 Ind. App. 277 (67 N. E. Rep. 713). In Missouri it is held that a widow's right of quarantine is a possessory right, on which an action of ejectment may be maintained or defended, and that this right is assignable, and carries with it all the incidents that belonged to it prior to the transfer. *Phillips v. Presson*, 172 Mo. 24 (72 S. W. Rep. 501); *Graham v. Stafford*, 171 Mo. 692 (72 S. W. Rep. 507). Mo Rev. Stat. 1899, § 2938 construed and applied—rights of surviving husband of wife dying without any child or descendant. *O'Brien v. Ash*, 169 Mo. 283 (69 S. W. Rep. 8).

Sec. 154. Advancements. A transfer of property to a child in pursuance of a moral duty rebuts the presumption that it is an advancement. *Grumley v. Grumley*. 63 N. J. Eq. 568 (52 Atl. Rep. 381). Use and occupation of land by a child with the consent of the parent may be charged as

an advancement where it is necessary to do justice in the settlement of the parent's estate. A conveyance made by a father to his son's child as a result of the son's request to the father for an advancement, and made thus to protect the land from the son's creditors, will be treated as an advancement to the son. *Hamilton v. Moore*, Ky. (70 S. W. Rep. 402; 24 Ky. Law Rep. 982). Construing and applying Ill. Rev. Stat., ch. 39, § 7, providing that "no gift or grant shall be deemed to have been made in advancement unless so expressed in writing or charged in writing, by the intestate, as an advancement, or acknowledged in writing by the child or other descendant," it is held that an advancement which is not evidenced in the manner required by the statute is, in legal effect, no advancement at all, however clear it may appear that it was so intended. *Gary v. Newton*, 201 Ill. 170 (67 N. E. Rep. 267).

Sec. 155. Rights of creditors against heirs and devisees. A general covenant to warrant and defend, being one which runs with the land, a covenantee to whom an action for its breach has accrued, after the estate of his covenantor has been settled and closed, may maintain an action against his heirs and devisees, and they are liable to the extent of the property reaching their hands. *McClure v. Dee*, 115 Ia. 546 (88 N. W. Rep. 1093; 91 Am. St. Rep. 181). When lands devised are subject to a mortgage given by testator, and the mortgage, after his death, is foreclosed, and the premises sold to devisee for a sum not exceeding the mortgage debt, he holds his title under the judicial sale, and not as a devisee, and is not liable for the debt of the testator. *Byrne v. Condon*, 68 N. J. L. 439 (53 Atl. Rep. 385). N. Y. Code Civ. Proc. §§ 1837-1860 construed and applied—action by creditors of decedent against heirs. *Matteson v. Palser*, 173 N. Y. 404 (66 N. E. Rep. 110).

Sec. 156. Purchaser from heir pending administration of ancestor's estate—Liability for heir's debt to the estate. The purchaser of real estate from an heir pending administration of his ancestor's estate does not take it subject to a debt of the heir to such estate, which has not been reduced to a judgment. *Russell v. Smith*, 115 Ia. 261 (88 N. W. Rep. 361). The court say: "True, we have held that a purchaser takes subject to an advancement to an heir, whether

with or without notice. *Finch v. Garrett*, 102 Ia. 386 (71 N. W. Rep. 429); *Pinckney v. Pinckney*, 114 Ia. 441 (87 N. W. Rep. 406). But we have never held that he takes subject to a debt. Indéed, the contrary seems to be the rule in this state. *Rider v. Clark*, 54 Ia. 292 (6 N. W. Rep. 271). This doctrine is also supported by the weight of authority, as well as of sound reason. *La Foy v. La Foy*, 43 N. J. Eq. 206 (10 Atl. Rep. 266; 3 Am. St. Rep. 302); *Sartor v. Beaty*, 25 S. C. 293; *Proctor v. Newhall*, 17 Mass. 81; *Mann v. Mann*, 12 Heisk, 245; *Scobee v. Bridges*, 87 Ky. 427 (9 S. W. Rep. 299); *Steele v. Frierson*, 85 Tenn. 430 (3 S. W. Rep. 649). That there are authorities to the contrary is conceded, but they fail to note the manifest distinction between a debt and an advancement. See *Oxsheer v. Nave*, 90 Tex. 568 (40 S. W. Rep. 7; 37 L. R. A. 98), and cases cited. There may be cases where, on account of the insolvency of the debtor, or for some other cause, equity will interfere for the protection of the estate, but this is not one of them."

Sec. 157. Miscellaneous notes. A deceased partner's interest in partnership real estate vests in his heirs at law, as such, subject to the equitable rights of the firm and its creditors. *Davidson v. Richmond*, (Ky.) 69 S. W. Rep. 794 (24 Ky. Law Rep. 699). Where the issue of one of two persons to whom land has been devised as tenants in common, with cross-remainders over, contingent on the death of either without issue, acquires title on account of the death of the other cotenant without issue, they take by descent and subject to incumbrances placed on the property by the original devisees. *Halsey v. Gee*, 79 Miss. 193 (30 So. Rep. 604). Where a purchaser at an administrator's sale pays part of the purchase price and goes into possession, the sale being confirmed, and then dies, and the purchase money is paid out of his personal estate and deed made to persons as his administrators, for the use of his heirs, the latter take the property by descent and not by purchase. *H. C. Frick Coal Co. v. Laughead*, 203 Pa. St. 168 (52 Atl. Rep. 172). An infant dying without issue seized of real estate held by deeds from others than a parent, but the purchase price of which was paid by one of his parents, does not hold title by "gift, devise or descent" from such parent so as to give such parent the exclusive

right to inherit, under Ky. Stat., § 1401, but such real estate passes to both parents equally under § 1393. *Guier v. Bridges*, Ky. (70 S. W. Rep. 288; 24 Ky. Law Rep. 945).

DESCRIPTION OF REAL ESTATE.

EPITOME OF CASES.

Sec. 158. Sufficiency of description—Collation of authorities. A description of the property in a contract to convey as one-third of all the grantor's "estate, real, personal or mixed, of whatever kind or nature, belonging to him in his own right, which he acquired under the will of Hannah Moayon, his mother, as well as all the other estate otherwise acquired or now owned by him," was held sufficient, on the ground that the property intended could be identified by parol evidence. *Moayon v. Moayon*, Ky. (72 S. W. Rep. 33; 60 L. R. A. 415; 24 Ky. Law Rep. 1641). The court say: "Can the intention of the parties, and the property to be affected by the writing, be gathered from this description? If so, the statute is complied with. It is the purpose of the description of the property concerning which a contract is made, to identify it. As said in *Warvelle on Vendors*, Vol. 1, section 96; 'While an unequivocal description, giving location, area, and boundaries, is a literal and perfect observation of the rule, a less particular statement will usually suffice, provided it contains within itself the proper means of identification, as by reference to extrinsic facts or other instruments by means of which the land can be ascertained with sufficient certainty.' The ideal, perfect description is preferred. But we cannot compel its adoption. It is our business to treat with such contracts as the parties have made, enforcing them when lawful and practicable. It is not necessary, then, that the writing should do more than indicate clearly what property is to be affected by it, if its description or identification can be gotten from the contract, or from any extrinsic fact or writing referred to in the contract. A portion of the property may be identified by

the will of Hannah Moayon, specifically referred to in the contract. It is necessarily of record to be a will, and that record will satisfy so much of the contract as treats of so much of appellee's property as derives its title from that source. The remainder of the description is: 'All the other estate otherwise acquired or owned by me.' In *Warvelle on Vendors*, sec. 135, it is said that a description as 'my house and lot' imports a particular house and lot, rendered certain by the description that it is the one that belongs to 'me.' The following descriptions have been held sufficient: 'My lot on the plat in the town of S., on the plat of said town, on the river bank'—*Colenck v. Hooper*, 3 Ind. 316 (56 Am. Dec. 505);—the 'Snow farm'—*Hollis v. Burgess*, 37 Kan. 487 (15 Pac. Rep. 536);—'H.'s place at S.'—*Hodges v. Kowing*, 58 Conn. 12 (18 Atl. Rep. 979; 7 L. R. A. 87);—the 'Knapp home property'—*Goodenow v. Curtis*, 18 Mich. 298;—an agreement to convey land described as 'occupied' by the vendor or a third person—*Angel v. Simpson*, 85 Ala. 53 (3 So. Rep. 758); *Towle v. Carmelo Land & Coal Co.*, 99 Cal. 397 (33 Pac. Rep. 1126); *Doctor v. Hellberg*, 65 Wis. 415 (27 N. W. Rep. 176). In all such cases parol evidence was admitted not to identify, but to designate, the subject-matter, already identified in the minds of the parties, in the language of the contract when read in the light of the facts. In this state, in *Overstreet v. Rice*, 4 Bush, 3 (96 Am. Dec. 279), the expression, 'We have swapped farms,' naming the terms, but without further description of either farm, was held sufficient, after the parties had themselves identified the lands intended to be affected, by taking possession of them. In *Ellis v. Deadman's Heirs*, 4 Bibb, 466, the writing was: '4 January, 1808. Received of Jesse Ellis \$—, in part pay for a lot he bought of me in the town of Versailles; it being the cash part of the purchase of said lot. Nathan Deadman.' This court said: 'Had the receipt specified the terms of the agreement, there would have been no doubt of the propriety of decreeing the specific execution.' It is as essential that the terms be specified as the description of the property. 'Ten acres adjoining him on the north,' in a bond for title to land of the vendor adjoining the vendee, was held sufficient in *Hanly v. Blackford*, 1 Dana, 2 (25 Am. Dec. 114). In *Henderson v. Perkins*, 94 Ky. 211 (21 S. W. 1035), the description was, 'my home place and storehouse.' It was held sufficient, on the authority of *Ellis v. Deadman's Heirs*, 4

Bibb, 466, and *Hanly v. Blackford*, 1 Dana 2 (25 Am. Dec. 114). In the case of *Varnum v. State*, 78 Ala. 28, the description was: 'My entire crop of every description, raised by me, or caused to be raised by me, annually, till this debt is paid.' While that was not concerning real estate, it was such a contract (one not to be performed within a year) as was, by the statute of frauds, required to be in writing. Concerning that description, that court said: 'It is objected to the admission in evidence of this mortgage that it was void for uncertainty in the description of the crops intended to be included in it. Whatever force there may be in this objection to the instrument on its face, this alleged uncertainty was capable of being removed, when read in the light of the circumstances surrounding the contracting parties at the time of its execution, by extraneous parol identification.' Parol evidence can not be introduced to vary, enlarge, or restrict the written terms of the contract. But frequently it is the case that application of apparently vague descriptions must be made by parol testimony, which puts before the court the facts and circumstances surrounding the parties when the contract was made or is to be executed, that its terms may be interpreted by the light from such surroundings. From this rule springs the maxim, 'That is certain which can be made certain.' In this case it has been said, 'all' means all. 'All of my land' is a description, by necessary implication and common understanding, referring to such lands as I may own, evidenced by the public records where land titles are required to be recorded, or to my actual and continuous possession for such time as under the law constitutes a title. This identification is complete, and admits of no possibility of mistake in this case. Applying to it the familiar usage of the courts in such matters, parol testimony may be allowed to designate the particular properties described and identified by the writing, and in the contemplation of the parties in making the contract."

Sec. 159. Sufficiency of description—General principles. A description of land correctly given by boundaries is not rendered fatally defective by an incorrect statement of the location of the land in a larger tract. *McLean v. Baldwin*, 136 Cal. 565 (69 Pac. Rep. 259). The omission from a description of the name of the county in which the

land is situated is immaterial, where the section, township and range are given. *Parker v. Burton*, 172 Mo. 85 (72 S. W. Rep. 663). The omission at the close of the description of one of two tracts of land embraced in the same deed, of the line separating them, is immaterial; and the same is true of the word "thence" between two calls of the deed, where the sense is apparent. *Johnson v. Harris*, (Ky.) 68 S. W. Rep. 844 (24 Ky. Law Rep. 449); *Griffin v. Durfee*, 29 Ind. App. 211 (64 N. E. Rep. 237).

Sec. 160. Sufficiency of description—Particular cases.

Where a testator owned only one three-acre tract on "Bloomsbury lane" it will pass under a devise of a "lot of three acres situated at the corner of Bloomsbury lane and the Rolling road," though it does not lie on the Rolling road and therefore not in the "corner." *Scarlett v. Montell*, 95 Md. 148 (51 Atl. Rep. 1051). A description of real estate in a county in Indiana, as "the north half of lots 43, 44, 45, in Reichelderfer's addition to the plat of the town of Harlan, being in the southwest $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of sec. 28, township 32 north, of range 14 east," was held not too indefinite to furnish the means of identifying the same. *Kelley v. Houts*, 30 Ind. App. 474 (66 N. E. Rep. 408). A sheriff's certificate of sale under a mortgage foreclosure decree correctly describing the premises, which described the premises as "commencing at the northeast corner of the west half of the northeast quarter of section thirty-five, thence south twenty-nine and ninety-eight hundredths chains, thence west parallel with the north line of said west half fourteen and forty hundredths chains to the west boundary of said tract of land, thence north along said boundary line twenty-nine and ninety eight hundredths chains to the place of beginning," was held sufficient; since, to make it complete, it was only necessary to read into it the word "thence" before the words "to the place of beginning." *Griffin v. Durfee*, 29 Ind. App. 211 (64 N. E. Rep. 237). A deed which describes land conveyed as "all accretions of lands and parcels of lands belonging to the government lot number ten (10) in section number one (1) in township number fifteen (15) north, range number thirteen (13) east; said accretions lying south of the meander line of the state of Nebraska, according to the government survey,"—is not void for uncertainty of description. De

Long v. Olsen, 63 Neb. 327 (88 N. W. Rep. 512). A contract for the sale of land containing no other description than "a strip of land in front of Golden Rule Store and Stent Market" was held void. *Craig v. Zelian*, 137 Cal. 105 (69 Pac. Rep. 853). For particular contracts for sale of land in which the descriptions were held too indefinite to authorize specific performance, see *Glos v. Wilson*, 198 Ill. 44 (64 N. E. Rep. 734); *Rampke v. Buehler*, 203 Ill. 384 (67 N. E. Rep. 796).

Sec. 161. Construction of descriptions. Where a deed contains two descriptions, each of which is in itself complete, one describing the land, conveyed by quantity and the other by metes and bounds, in case of conflict the description by metes and bounds will control, and that by quantity will be rejected. *Seeders v. Shaw*, 200 Ill. 93 (65 N. E. Rep. 643). In construing a conveyance of land as bounded "easterly by beach of Long Island Sound," the word "beach" has no such inflexible meaning that it must denote land between high and low water mark, but it should be construed in the light of the circumstances surrounding the execution of the deed, and may refer to land above the high water mark. *Wakeman v. Glover*, 75 Conn. 23 (52 Atl. Rep. 622). Where a lot is conveyed in two parcels, by separate deeds, one describing the portion conveyed as "measuring forty-six feet front" and the other as "fronting forty-one feet, more or less," the certain description as to frontage will prevail though it reduces the other to less than forty-one feet. *Long v. Ragan*, 94 Md. 462 (51 Atl. Rep. 181). The use of the conventional words "more or less" in a will in which the testator defines the boundaries of city lots devised, to the inch, will not be construed to reduce the frontage of a lot to the extent of eight or ten feet. *Krechter v. Grofe*, 166 Mo. 385 (66 S. W. Rep. 358). A stipulation in a deed that the north boundary of the tract conveyed is the south line of another designated tract, the true location of which coincides with the evident intention of the parties will prevail over a map or survey referred to in the deed as describing the premises, in case of a conflict, the map not being attached to the deed, recorded or shown to have been considered by the parties when making the deed. *Post Hill Imp. Co. v. Brandegee*, 74 Conn. 338 (50 Atl. Rep. 874). A mortgage sufficiently describing property covered by it as lot No. 95 on a certain map, which in attempting to describe such lot by

metes and bounds gives a description of lot No. 96 on the same map, will be construed as conveying lot No. 95, where it appears that it was the intention of the mortgagors to mortgage lot No. 95 and that they did not own lot No. 96 at the time of the execution of the mortgage. *Lewis v. Ferris*, N. J. Eq. (50 Atl. Rep. 630). The dividing line between two lots devised by a will, which is fixed in clear and unambiguous terms by the stipulated dimensions of one of the lots, will not be varied by the fact that it does not coincide with the dividing line of insignificant improvements erected by the testator for the use of tenants occupying such respective lots. *Krechter v. Grofe*, 166 Mo. 385 (66 S. W. Rep. 358). Where one, after making an agreement to lease certain designated premises, conveys such premises excepting from his warranty the lease "to be executed," the deed and the agreement will be considered together in determining the sufficiency of the description in the agreement in an action for its specific performance. *Boston Clothing Co. v. Solberg*, 28 Wash. 262 (68 Pac. Rep. 715). Cal. Code Civ. Proc., § 2077 construed and applied—construction of descriptions. *Dutra v. Pereira*, 135 Cal. 320 (67 Pac. Rep. 281). For construction of particular descriptions in wills, see *Peebles v. Graham*, 128 N. C. 218 (39 S. E. Rep. 24); *Peebles v. Graham*, 128 N. C. 222 (39 S. E. Rep. 25).

Sec. 162. Evidence in aid of descriptions. A description of property in an instrument in the form of a deed conveying certain estate and rights therein to his two daughters, as the grantor's "homestead place in Dickinson County, Kansas, which my two daughters aforesaid helped me to improve," is such a description as may be made certain by extrinsic evidence. *Powers v. Scharling*, 64 Kan. 339 (67 Pac. Rep. 820). Mere indefiniteness in description, though it be such as to render a deed *prima facie* inoperative, does not necessarily have that effect; but evidence of extrinsic facts, relative to the situation of the parties and the circumstances attending the conveyance, may be looked into for the purpose of identifying its subject-matter, and it is only upon the failure of such evidence to give certainty to the description that the instrument will be declared void. *Caston v. McCord*, 130 Ala. 318 (30 Rep. 431). When a description in a deed or devise is clear and explicit, and without ambiguity, there is no room for construction, or for the admission of parol evidence, to prove that

the parties intended something different. *King v. New York & C. Gas Coal Co.*, 204 Pa. St. 628 (54 Atl. Rep. 477). For particular fact cases as to the admissibility of extrinsic evidence in aid of descriptions, see *Duggan v. Uppendahl*, 197 Ill. 179 (64 N. E. Rep. 289); *McKenzie v. Houston*, 130 N. C. 566 (41 S. E. Rep. 780). *Eufaula Nat. Bank v. Pruett*, 128 Ala. 470 (30 So. Rep. 731).

Parol evidence may be resorted to for the purpose of identifying the description contained in the writing, with its location upon the ground, but not for the purpose of ascertaining and locating the land about which the parties negotiated, and supplying a description thereof which they have omitted from the writing. *Craig v. Zelian*, 137 Cal. 105 (69 Pac. Rep. 853). Where a description in a deed of a city lot locates the beginning point as the "north corner" of another designated lot, having two north corners, parol evidence is admissible to show that the northeast corner was intended, where the deed can thus be given effect, and it would otherwise be meaningless. *Hereford v. Hereford*, 131 Ala. 573 (32 So. Rep. 620). In the case of *Knight v. Alexander*, 42 Or. 521 (71 Pac. Rep. 657), the supreme court of Oregon say: "Courts do not permit parol evidence to be given to describe the property intended to be included in the contract, and then apply such description to the terms thereof. Thus, an agreement to exchange woolen mills in Franklin, Ind., for 640 acres of land in Anderson county, Kan., was held to be indefinite and uncertain as to the property in Kansas, although the plaintiff owned but one tract of land in that state—*Baldwin v. Kerlin*, 46 Ind. 426;—and, again, a tract described as 'his one hundred acres of land' is indefinite and uncertain, and cannot be aided by parol—*Breaid v. Munger*, 88 N. C. 297. Nor is an agreement to 'sell two acres of ground * * * at the point he [the purchaser] may select' sufficient—*Carr v. Passaic Land Improvement & Bldg. Co.*, 19 N. J. Eq. 424;—nor will a court enforce the specific performance of a contract to convey 'the one hundred and twenty acres of land in Shannon county, Missouri,'—*Miller v. Campbell*, 52 Ind. 125;—nor 'five acres, lot 3, sec. 23, town 28, range 23'—*Nippolt v. Kammon*, 39 Minn. 372 (40 N. W. Rep. 266)."

Sec. 163. Considering date line of an instrument to aid an imperfect description. Where a contract for the conveyance of land which describes it as "Lot 30 Douglas Park"

is dated "Indianapolis, Ind., Mar. 15, 1889," the latter phrase will be treated as part of the contract in aid of the description. *Maris v. Masters*, 31 Ind. App. 235 (67 N. E. Rep. 699). The court say: "The writing bears date at Indianapolis, Ind. This may indicate that the lot was situate in said city. In *Mead v. Parker*, 155 Mass., at page 414 (20 Am. Rep. 110), it was held to be 'an inference of fact, though not conclusive,' that the land is situate in a certain place, owing to the fact that the written contract to convey is dated at that place. *James Riley v. Addie Hodgkins*, 57 N. J. Eq. 278 (41 Atl. Rep. 1099), was a suit for the specific performance of an alleged agreement to convey certain lots in Jersey City. One objection to the complaint was that the description in the contract was too vague and indefinite to be enforced. The alleged contract of sale was dated at Jersey City. The court said: 'It may well be argued, however, that, in naming a place in the memorandum, the maker of it considered himself as speaking from that locality, not only to indicate the place where he was given a receipt for the purchase price, but also as covering the interior specifications, by number of lot, block, and streets of the location of the lands agreed to be sold.' See, also, *Price v. McKay, et al.*, 53 N. J. Eq. 588 (32 Atl. Rep. 130). For the purpose of determining the sufficiency of the complaint, the presumption is that the lot in question is located where the agreement is dated. We then have to assert, in the identification of the real estate involved, the fact that it is lot 30 Douglas Park, Indianapolis, Ind. If there is such an addition to Indianapolis, the identification of the lot will follow."

EASEMENTS.

EPITOME OF CASES.

Sec. 164. Creation by grant or reservation. A purchaser of lots forming a part of a tract of land owned by his vendors, who bought according to a plan that showed proposed streets running through the whole tract, and by two of which his estate was bounded, as between him and his

vendors retaining title to all the remaining land, acquires a right of way over and through that portion described as streets, at least to the extent of gaining access to the public ways. *Drew v. Wiswall*, 183 Mass. 554 (67 N. E. Rep. 666). A deed of conveyance made by the owner of a tract of land, upon a portion of which was located a fresh-water lake, by which deed he conveyed to the grantee a portion of the upland adjoining the lake, "together with" certain rights and privileges to be exercised upon the waters of the lake by the grantee, her heirs and assigns, passes such rights and privileges as appurtenant to the upland, and not in gross. *Mitchell v. D'Olier*, 68 N. J. L. 375 (53 Atl. Rep. 467; 59 L. R. A. 949). Where, by a deed a lot of land is conveyed by apt words and distinct description, and in the same deed there is an agreement for a "free and unobstructed right of way over a certain private alley, situate," etc., by separate and disassociated description, not referring the right of way to the lot, the right of way is in gross, and not appendant to the holding of the lot. *Shreve v. Mathis*, 63 N. J. Eq. 170 (52 Atl. Rep. 234). Mutual covenants in an agreement between the owners of the respective parts thereof, "that no change in the front of said building, or in the principal entrance thereto, shall be made by either party without the consent of the other," are to be construed as grants of negative easements for the benefit of the respective properties. *First Nat. Bank v. Portsmouth Sav. Bank*, 71 N. H. 547 (53 Atl. Rep. 1017).

Sec. 165. Devise of a right of way "absolutely" does not pass the fee. A devise by a testator to his son of a part of a tract of land, not adjoining the highway, "with the right of way from the highway," to be his "absolutely" does not pass the fee of the way to the devisee. *Truax v. Gregory*, 196 Ill. 83 (63 N. E. Rep. 674). The court say: "The word 'absolute,' when used in connection with a gift or grant of personal or real property, has been frequently interpreted to carry a fee. But it is not to be given that as its fixed and unvaried meaning. The context of the instrument in which the word appears may determine the effect to be given it. It may be used in connection with an interest in property, and yet not be regarded as the equivalent of 'unqualified.' *Williams v. Vancleve*, 7 T. B. Mon. 393; *Insurance Co. v. Kelly*, 32 Md. 421 (3 Am. Rep. 149). In

Smith v. Bell, 6 Pet. 72 (8 L. Ed. 322), the word 'absolutely,' used with reference to an estate in personalty, was held to be qualified by other words of the bequest, and thereby explained only such absolute rights as a tenant for life could enjoy. In *Bradley v. Westcott*, 13 Ves. 450, the word was given a similarly restricted meaning and operation. In *Boyd v. Strathan*, 36 Ill. 355, the cases of *Smith v. Bell*, *supra*, and *Bradley v. Westcott*, *supra*, were cited with approval, and the doctrine of those cases applied to the controversy then under consideration. In *Kratz v. Kratz*, 189 Ill. 276 (59 N. E. Rep. 519), the words 'absolutely and unqualifiedly,' used in a will in connection with an estate in lands, were so qualified in meaning as to confer only the right to hold and enjoy an estate as a tenant for life, or during the widowhood of the devisee."

Sec. 166. Creation by prescription. An easement by prescription can not arise from a permissive use. *Kibbey v. Richards*, 30 Ind. App. 101 (65 N. E. Rep. 541; 96 Am. St. Rep. 333); *Hartley v. Vermillion*, Cal. (70 Pac. Rep. 273); *Rose v. City of Farmington*, 196 Ill. 226 (63 N. E. Rep. 631); *Phoenix Ins. Co. v. Haskett*, 64 Kan. 93 (67 Pac. Rep. 446). In order to establish an easement by prescription, the acts relied upon to create such prescriptive right must have been an invasion of the rights of the party against whom it is set up and for which he might have maintained an action. *Schulenberg v. Zimmerman*, 86 Minn. 70 (90 N. W. Rep. 156). To the same effect is the case of *Phoenix Ins. Co. v. Haskett*, 64 Kan. 93 (67 Pac. Rep. 446). The acquiescence on the part of a railroad company in the use of its right of way as a passway does not confer authority or right. The use is merely permissive, and the company may close up the passway at any time. *Illinois Cent. R. Co. v. Waldrop*, (Ky.) 72 S. W. Rep. 1116 (24 Ky. Law Rep. 2127); *Chicago, B. & Q. R. Co. v. Ives*, 202 Ill. 69 (66 N. E. Rep. 940). To establish a highway by prescription there must be a general uninterrupted public use under a claim of right continued for the statutory period. *Fairchild v. Stewart*, 117 Ia. 734 (89 N. W. Rep. 1075). *Hill v. McGinnis*, 64 Neb. 187 (89 N. W. Rep. 783). See opinions for particular facts held insufficient to establish such a way. The deepening of the channel of a natural water course by one on his own land by the construction of a

ditch in the channel thereof, although maintained for the prescriptive period, does not give an upper adjoining owner any easement for the permanent maintenance of such ditch; but the owner constructing it may fill it up to the natural bed of the stream. *Schulenberg v. Zimmerman*, 86 Minn. 70 (90 N. W. Rep. 156). Although statutes of limitations do not directly apply to actions in which easements or other incorporeal hereditaments are involved, still by judicial construction an adverse user of an easement for the period specified in the statute, barring actions for the recovery of lands, is now by analogy held to be a conclusive judicial presumption of a prescriptive right by a lost grant. This rule applies to the acquisition by a railroad company of an easement in a right of way; and where it has appropriated and publicly and notoriously used land as a right of way for the prescriptive period such an easement is created without proof by it of the owner's knowledge of such appropriation and use. *Boyce v. Missouri Pac. R. Co.* 168 Mo. 583 (68 S. W. Rep. 920; 58 L. R. A. 442). The provisions of Utah Rev. Stat. 1898, §§ 2865, 2866, concerning the acquisition of title to land by seven years' adverse possession and payment of taxes, do not apply to the acquisition of an easement by prescription. *Coleman v. Hines*, 24 Utah, 360 (67 Pac. Rep. 1122). Ia. Code, § 3004 construed and applied—evidence required to establish easement by prescription, in addition to proof of use. *O'Reagan v. Duggan*, 117 Ia. 612 (91 N. W. Rep. 909).

Sec. 167. Appurtenant or implied easement. A conveyance of the dominant estate passes appurtenant rights although not mentioned. *Mitchell v. D'Olier*, 68 N. J. L. 375 (53 Atl. Rep. 467; 59 L. R. A. 949). Easements running with the land pass to one acquiring the dominant estate under right of eminent domain. *Deavitt v. Washington County*, 75 Vt. 156 (53 Atl. Rep. 563). An appurtenant easement created by a separate deed passes by a conveyance of the dominant estate, though the conveyance creating it contained no words of assignability. *Stovall v. Coggins Granite Co.*, 116 Ga. 376 (42 S. E. Rep. 723). A clause in a deed which saves and excepts from its operation a certain designated portion, which it expressly dedicates to the perpetual use of the owners and occupants of property abutting thereto, creates a perpetual easement in favor of such own-

ers and occupants which attaches to and passes with the abutting property as an appurtenance. *Northern Pac. Ry. Co. v. Duncan*, 87 Minn. 91 (91 N. W. Rep. 271).

Sec. 168. Way of necessity. A way of necessity can not be claimed by one who has other means of access to his property, though with great inconvenience. *Dee v. King*, 73 Vt. 375 (50 Atl. Rep. 1109). A way of necessity may be reserved as well as granted by implication. *Dee v. King*, 73 Vt. 375 (50 Atl. Rep. 1109). A way of necessity is founded upon an implied grant and the right to such a way cannot arise between the owners of adjoining lots upon which they have erected a building, from a parol agreement between them as to the use of the building. *Quimby v. Straw*, 71 N. H. 160 (51 Atl. Rep. 656). A way of necessity exists where land is granted which is either wholly surrounded by land of the grantor or partially by such land, and elsewhere by land of strangers. In such a case, if there be no other way to the land, the law presumes that it was the intention of the parties that the grantee should have access to it over the land of the grantor, and he has a way across such land in order to make it available. *Fairchild v. Stewart*, 117 Ia. 734 (89 N. W. Rep. 1075). Citing, *Ward v. Robertson*, 77 Ia. 159 (41 N. W. Rep. 603); *Forrest Milling Co. v. Cedar Falls Mill Co.*, 103 Ia. 633 (72 N. W. Rep. 1076); *Collins v. Prentice*, 15 Conn. 39 (38 Am. Dec. 61); *Brown v. Berry*, 6 Cold. 98; *Pettingill v. Porter*, 8 Allen, 1 (85 Am. Dec. 671); *Wissler v. Hershey*, 23 Pa. 333; *Kimball v. Railroad Co.*, 27 N. H. 448 (59 Am. Dec. 387); *Lore v. Stiles*, 25 N. J. Eq. 381; *Bass v. Edwards*, 126 Mass. 445; *Cheney v. O'Brien*, 69 Cal. 199 (10 Pac. Rep. 479); 19 Am. & Eng. Enc. Law, 96.

Sec. 169. Way of necessity—Location and use. The right of a purchaser of timber to a way of necessity over the lands of his vendor, to use a particular way depends on its being reasonably necessary. *Worthen v. Garno*, 182 Mass. 243 (65 N. E. Rep. 67). The owner of a way of necessity of a specified width cannot compel a widening of the way because the soil is so low and wet for a large portion of the year that he cannot pass over the way without inconvenience or difficulty. *Dudgeon v. Bronson*, 159 Ind. 562 (64 N. E. Rep. 910; 95 Am. St. Rep. 315; See pp. 318-330 for exhaustive note on "Rights and obligations of parties to private ways"). A com-

plaint to establish and locate a way of necessity over the land of another must allege that the plaintiff requested of the owner of the servient estate to select the location of the way, and that such owner had failed to select the way requested, or that, when requested to do so, such owner had failed to select the way in a reasonable manner; and, in case the owner of the servient state had failed to select the way, that the plaintiff had selected a route for the same; and the complaint should give a correct description of the route so selected. *Thomas v. McCoy*, 30 Ind. App. 555 (66 N. E. Rep. 700).

Sec. 170. Lateral support. A complaint in an action for damages for removing the support of a wall by excavations on an adjoining lot, upon which the wall partly rests, which does not allege that the wall is a party wall, must allege such facts as show an easement in such lot for the support of the wall. *Payne v. Moore*, 31 Ind. App. 360 (66 N. E. Rep. 483). The owner of half of a double house, who tears his half down in pursuance of an order of the board of health, cannot be held liable in damages to the owner of the other half, because of his doing so without replacing the support which his half afforded to the other half. *McKenna v. Eaton*, 182 Mass. 346 (65 N. E. Rep. 382; 94 Am. St. Rep. 661). One who, by mining operations upon his own land, removes the lateral support of an adjacent tract of land to its injury, is not relieved from liability therefor on account of the fact that in a prior conveyance by him of the surface of the injured tract he reserved the right to mine the same, and to pass through and use the land below the surface as may be "necessary or convenient in mining from said land and from any other land, as fully and freely as if this grant had not been made, without making compensation therefor." *Matulys v. Philadelphia & R. Coal & I. Co.*, 201 Pa. St. 70 (50 Atl. Rep. 823).

In discussing the right of a landowner to make excavations, the supreme court of North Carolina, in the case of *Davis v. Summerfield*, 131 N. C. 352 (42 S. E. Rep. 818; 92 Am. St. Rep. 781), say: "The true rule deducible from the authorities seems to be that while the adjacent proprietor cannot impair the lateral support of the soil in its natural condition, but is not required to give support to the artificial burden of a wall or building superimposed upon the soil, yet he must not dig in a negligent manner, to the injury of that wall or building; and it is negligence to excavate by the side of the

neighbor's wall, and especially to excavate deeper than the foundation of that wall, without giving the owner of the wall notice of that intention, that he may underpin or shore up his wall, or relieve it of any extra weight on the floors, and the excavating party should dig out the soil in sections, at a time so as to give the owner of the building opportunity to protect it, and not expose the whole wall to pressure at once."

Sec. 171. Lateral support—Removal of sand from sea shore—Liability for injury to property not adjacent. Where the excavation of sand from the sea shore by the owner thereof results, though the law of gravitation or wave motion, in the removal of the adjoining soil, and such removal exposes the property of a third person to the erosive action of the sea, he is liable for the injury so resulting to such third person, if such injury was the reasonable and probable sequence of his act. *Murray v. Pannaci*, 64 N. J. Eq. 147 (53 Atl. Rep. 595). The court say: "The question remains, whether the fact that the place of excavation adjoins lands of the state, and not the lands of the complainant, deprives the complainant of her right to redress. If the act of the defendant resulted in a material injury to the land of the complainant, and such injury was the proximate and reasonable result of such act, I am of the opinion that the complainant is entitled to relief. Adjacency is not the ground upon which protection to property for such acts rests. The rule to be applied is analogous to that underlying the doctrine of lateral support. The liability of an excavator is not limited to the injury done to the adjacent owner, but includes any injury to any owner of land within the zone of support. *Corporation of Birmingham v. Allen*, 6 ch. Div. 284; *Keating v. City of Cincinnati*, 38 O. St. 141 (43 Am. Rep. 421); *Gilmore v. Driscoll*, 122 Mass. 199 (23 Am. Rep. 312)."

Sec. 172. Light and air. An easement of light is an incumbrance, and the conveyance of one of two adjoining lots belonging to the same person, with covenant against incumbrances, negatives the reservation by implication of an easement of light and air for a window in a building on another lot, facing the lot conveyed, in the absence of an actual "necessity" for such easement. *Denman v. Mentz*, 63 N. J. Eq. 613 (52 Atl. Rep. 1117). Where the owner of three lots lying side by side erects on the middle lot a double building designed

for residence purposes, which occupies the entire width of the lot, the only means for lighting one side of which is through windows placed by him in the building overlooking his lawn on the adjoining lot, and afterward conveys such middle lot, his grantee acquires an easement of light and air over such lawn of which he cannot be completely deprived by the grantor erecting a high, tight board fence on his property line opposite the windows; and he does not acquire the right to do this by the fact that the rooms having these windows have been occupied by tenants of a bad character who have been removed upon complaint, or that refuse has been cast out of the building through the windows onto his lawn; nor is the implication of the easement excluded by the fact that the conveyance expressly granted the right to use a 7-foot alley off the lot on the other side of the house, or that the windows in question were built in an inset in the wall 12 feet long and 18 inches in depth from the property line. *Bloom v. Koch*, 63 N. J. Eq. 10 (50 Atl. Rep. 621).

Sec. 173. Rights of dominant and servient owners.

The erection of gates or bars at the termini of a private way is not an unreasonable interference with the use of the way. *Truax v. Gregory*, 196 Ill. 83 (63 N. E. Rep. 674). The right to maintain a railing alongside a path, an easement in which is claimed by prescription, is incident to and forms a part of the easement where such railing is necessary to the use of the path and has been maintained since the commencement of the use of such path. *Baldwin v. Boston & M. R. R.*, 181 Mass. 166 (63 N. E. Rep. 428). The owner of a lot bordering on an alley which opens out into a street, and who has an easement therein for "ingress and egress from and to" the street, the fee being in another, has no right to erect a permanent structure in and over such alley, notwithstanding the presence of such structure may not interfere with the use of the alley as a mere passage way. *Murphey v. Harker*, 115 Ga. 77 (41 S. E. Rep. 585). Any use consistent with a right of way, by foot passage, or by teams, wagons, horses or other animals is within an agreement for a "free and unobstructed right of way over a certain private alley, situate," etc., contained in a conveyance of a lot of land but described by a separate description, not referring the right of way to the lot. *Shreve v. Mathis*, 63 N. J. Eq. 170 (52 Atl. Rep. 234). A right of way over a

foot path acquired by use for the prescriptive period by members of one family residing on the dominant estate may be used by occupants of other houses afterwards erected on such estate. *Baldwin v. Boston & M. R. R.*, 181 Mass. 166 (63 N. E. Rep. 428). Where the owners of adjoining lots by the erection of their buildings create a common stairway and area, without any agreement as to their use, there is no inference that each party gave the other an unlimited right to use the common area for such purposes and in such manner as he might desire, or even for general use for a stairway, but that the right was definitely confined to the common area as it was established by the parties at the time and as it continued to be jointly used. *Allegheny Nat. Bank v. Reighard*, 204 Pa. St. 391 (54 Atl. Rep. 268). For construction of particular grant of way which is held not to confer the right to build over such way, see *Crocker v. Cotting*, 181 Mass. 146 (63 N. E. Rep. 402). For exhaustive note on "Rights and obligations of parties to private ways," see 95 Am. St. Rep. 318-330.

Sec. 174. Rights of dominant and servient owners—
Right of one having a right of way to grade and gravel it.
One claiming under a grant of a right of way giving him the right and privilege of passing and repassing on foot, or with horses, carriages or other vehicles, has a right to grade and gravel such way; but in the exercise of this right he can not unnecessarily obstruct a ditch previously constructed on the land by his grantor and subject to which it evidently appears he acquired his way. *Hotchkiss v. Young*, 42 Or. 446 (71 Pac. Rep. 324). The court say: "Where the easement granted is a right of way, it accords to the grantee the right to use the surface of the soil for the purpose of passing and repassing, and the incidental right of properly fitting the surface for that use. He may level, gravel, plow, pave, and even grade, and for the latter purpose dig up and use the soil so as to adapt it to the use accorded, and to the nature of the way granted or reserved. Washb. Easem. (2d. Ed.) *188; Jones, Easem. § 817; *Thompson v. Uglow*, 4 Or. 369; *Atkins v. Bordman*, 2 Metc. (Mass.) 457, 467 (37 Am. Dec. 100); *McMillan v. Cronin*, 75 N. Y. 474. Nothing passes as incident to such a grant, however, but what is reasonable to the fair enjoyment thereof,—that is, the reasonable and usual enjoyment and

user of such a privilege; and the owner may nevertheless appropriate his land to such purposes as he pleases, consistent with the rights of the grantee, according to the nature of his grant. Washb. Easem. (2d. Ed.) *189. Morton, C. J., says in *Burnham v. Nevins*, 144 Mass. 88 (10 N. E. Rep. 494; 59 Am. Rep. 61): 'These general principles are that a man who owns land subject to an easement has the right to use his land in any way which is not inconsistent with the easement, but has no right to use it in a way which is inconsistent with the easement, and that the extent of the easement claimed must be determined by the true construction of the grant or reservation by which it is created, aided by any circumstances surrounding the estate and the parties, which have a legitimate tendency to show the intention of the parties.' The rights of the respective parties to the easement are therefore more or less correlative and interdependent, and are to be determined somewhat by the circumstances attending the grant; in other words, it will be construed in the light of the conditions existing at the time. *Herman v. Roberts*, 119 N. Y. 37 (23 N. E. Rep. 442; 7 L. R. A. 226; 16 Am. St. Rep. 800). Now, in the case at bar, when the easement was granted to the defendant it was incumbered by the plaintiff's ditch, in which he was conducting water from Silvies river for irrigating his premises; and the grantee must be considered to have taken the grant subject to this incumbrance, unless the space occupied thereby, or the soil supporting it, is reasonably necessary for the construction of a proper roadway for passing and repassing on foot, or with carriages and other vehicles."

Sec. 175. Abandonment or extinguishment of easement. An easement in fee can not be extinguished by the unauthorized use of it. *Deavitt v. Washington County*, 75 Vt. 156 (53 Atl. Rep. 563). A right of way established by adverse use will not be divested by afterward obtaining a license to use it. *Dee v. King*, 73 Vt. 375 (50 Atl. Rep. 1109). The right to the use and enjoyment of a privilege in a particular building of another, which does not involve any interest in the soil apart from the building, is extinguished by the destruction of the building. *Bonney v. Greenwood*, 96 Me. 335 (52 Atl. Rep. 786). While the state of Indiana acquired a fee-simple estate, and not a mere easement, in the lands occupied and used in the construc-

tion of the Wabash & Erie Canal, yet, where a public street was taken and used for the purposes of the canal, the original easement of the public in such street revived and attached upon the abandonment of the canal as such; and an abutting lot owner, although owning the fee in the street, could not quiet his title as against the municipality. *City of Huntington v. Townsend*, 29 Ind. App. 269 (63 N. E. Rep. 36). A railroad company making a cut across a lane constituting an appurtenant easement to land, which it bridges over along the line of the lane so as to permit its use as before, does not interfere with the use of the lane so as to start the running of the statute of limitations. *Neff v. Pennsylvania R. Co.*, 202 Pa. St. 371 (51 Atl. Rep. 1038). The reconstruction of a destroyed building in a hall and stairway of which an adjoining owner had an easement, under a contract between the owner for a "partition wall of brick," and in such manner that all parts of both buildings could be occupied and enjoyed independently of the other, extinguishes the original easement. *Bonney v. Greenwood*, 96 Me. 335 (52 Atl. Rep. 786). A grantee of a part of a tract of land "together with the use of a stairway as the same now is constructed and used, and on and adjoining said property on the east side thereof, and to have free access and use of said stairway so long as the same shall there remain," which stairway forms a part of a building on the remainder of the land, but which encroached a few inches on the tract conveyed, extinguishes his right to such easement by compelling a subsequent purchaser of such building to move it, including the stairway, over so as to obviate such encroachment. *Stenz v. Mahoney*, 114 Wis. 117 (89 N. W. Rep. 819).

EJECTMENT.

EPITOME OF CASES.

Sec. 176. As to when the action will lie and who may maintain it. One tenant in common may maintain ejectment against third parties. *Shelton v. Wilson*, 131 N. C. 499

(42 S. E. Rep. 937). A landlord may maintain an action for possession against a former tenant, after he has leased the premises to a third person by a lease giving him the right of possession. *Schreiner v. Stanton*, 26 Wash. 563 (67 Pac. Rep. 219). Ejectment cannot be maintained by a landlord for breach of covenants by his lessee unless there be a stipulation in the lease that such a breach of covenant shall work a forfeiture or determination of the lessee's interest. *Ocean Grove Camp Meeting Ass'n v. Sanders*, 68 N. J. L. 631 (54 Atl. Rep. 448). Ejectment cannot be maintained by the guardian of an insane person to recover land conveyed before his appointment by his ward, without the deed first being set aside in equity. *McAnaw v. Clark*, 167 Mo. 443 (67 S. W. Rep. 249). An action in ejectment cannot be maintained during the pendency of a prior action in equity between the same parties, in which the plaintiff alleges that defendant wrongfully withholds possession of the same property from the plaintiff, and asks to enjoin the defendant from excluding the plaintiff therefrom. *Shaughnessy v. St. Andrew's Church*, 63 Neb. 798 (89 N. W. Rep. 263). The fact that the bed of navigable waters, the fee to which is in a city, is subject to the right of the flow of water over it and to navigation thereon, does not affect the right of the city to maintain ejectment against one who has ousted it or claims to hold adversely. *Mobile Transp. Co. v. City of Mobile*, 128 Ala. 335 (30 So. Rep. 645; 86 Am. St. Rep. 143). Va. Code, § 2726, as amended by Laws 1895-96, p. 514, does not authorize a person in possession of land to maintain ejectment against one claiming adversely to him. *Steinman v. Vicars*, 99 Va. 595 (39 S. E. Rep. 227).

Ejectment is the appropriate remedy by a municipality to recover possession of a dedicated street, *Inhabitants of Palmyra Tp. v. Pennsylvania R. Co.*, 62 N. J. Eq. 601 (50 Atl. Rep. 369); and the original owner, or those claiming under him, of land dedicated to public use may maintain ejectment against a permanent incumbrancer or occupier, inconsistent with or repugnant to the purpose of the dedication or grant, *Northern Pac. Ry. Co. v. Lake*, 10 N. Dak. 541 (88 N. W. Rep. 461). Citing *Gardiner v. Tisdale*, 2 Wis. 153 (60 Am. Dec. 407); *Thomas v. Hunt*, 134 Mo. 392 (35 S. W. Rep. 581; 32 L. R. A. 857); *Taylor v. Armstrong*, 24 Ark. 102; *Coburn v. Ames*, 52 Cal. 385 (28 Am. Rep. 634); *Weyl v. Railroad Co.*, 69 Cal. 202 (10 Pac. Rep. 510); *Wright v. Carter*, 27 N. J. L. 76; *Carpenter v. Railroad Co.*, 24 N. Y. 655; *Wager v. Railroad*

Co., 25 N. Y. 526; *Sherman v. McKeon*, 38 N. Y. 266; *Strong v. City of Brooklyn*, 68 N. Y. 1; *Smeberg v. Cunningham*, 96 Mich. 378 (56 N. W. Rep. 73; 35 Am. St. Rep. 613); *Elliott, Roads & S.* 519-538; *Jones, Easem.* §§ 547, 548; 10 Am. & Eng. Enc. Law (2d Ed.) 473, and cases cited at note 2.

Sec. 177. Ejectment not the proper remedy for interference with rights of street railway company in streets.

Ejectment is not the proper remedy for a street railroad company whose rights in a public street are being interfered with by another railway company. *Fresno St. R. Co. v. Southern Pac. R. Co.*, 135 Cal. 202 (67 Pac. Rep. 773). The court say: "In the city of *Racine v. Crotsenberg*, 61 Wis. 481 (21 N. W. Rep. 520; 50 Am. Rep. 149), it is said: 'No one will contend that an action of ejectment will lie to recover a simple right of way. Such an easement is incorporeal in its nature, and ejectment lies only to recover things corporeal which may be the subjects of seisin, entry, and possession. There can be no seisin of an incorporeal hereditament, and it cannot be the subject of entry or possession. It "lyeth in grant and not in livery."' The same rule was held in *Fritsche v. Fritsche*, 77 Wis. 270 (45 N. W. Rep. 1089), where it is said: 'It is well settled, both on principle and by authority, that the action cannot be maintained for such purpose.' That was ejectment, also, to recover a private right of way claimed by the plaintiff as against the defendant, who had obstructed the same at some point. The right to a fee and the right to an easement in the same estate are rights independent of each other, and may subsist together when vested in different persons. Each can maintain an action to vindicate and establish his right. The owner of the fee is the one entitled to the exclusive possession, and may protect and enforce his right by ejectment, but, for the disturbance or obstruction of an easement or franchise, ejectment is not the proper remedy. In addition to the cases quoted, see, further, *Child v. Chappell*, 9 N. Y. 246; *Washb. Easem.* 568; *Taylor v. Gladwin*, 40 Mich. 232; *Smith v. Wiggins*, 48 N. H. 105; 2 Bac. Abr. 417; *Adams, Ej.* 16; *Runn. Ej.* 25."

Sec. 178. Ejectment against railroad. A landowner may maintain ejectment for land occupied by a tram railway constructed without his consent and by one not having the power of eminent domain. *Hughey v. Walker*, Ark.

(73 S. W. Rep. 1093). In Mississippi it is held that a railroad company which has taken possession of land under defective condemnation proceedings is subject to an action of ejectment. *Illinois Cent. R. Co. v. Hoskins*, 80 Miss. 730 (32 So. Rep. 150; 92 Am. St. Rep. 612). A landlord, who, with knowledge of its operations, acquiesces in a railroad company constructing a railroad on his land, is estopped to maintain ejectment; and this rule is held to apply where the land affected was part of a homestead. *Hendrix v. Southern Ry. Co.*, 130 Ala. 205 (30 So. Rep. 596; 89 Am. St. Rep. 27). The fact that the owner of land, who is demanding compensation for its use as a right of way by a railroad company, does not object to the company appropriating it to such use pending negotiations looking to a settlement of his claim, which were never completed and no compensation ever paid, does not give the company a right to an injunction against an action of ejectment by such owner, without it first making compensation to him for the land taken. *McLure v. Alabama Midland Ry. Co.*, 130 Ala. 436 (30 So. Rep. 440). One owning a lot abutting on an alley, who solicits a railroad company to locate its railroad therein, which the company consents to do in consideration of a parol grant by such owner of the right to occupy a ten-foot strip across the lot with a switch, can not maintain ejectment against the company after it has constructed its tracks in accordance with such arrangement. *Maupin v. Chicago, R. I. & P. Ry. Co.*, 171 Mo. 187 (71 S. W. Rep. 334). A landowner who has permitted the construction and operation of a railroad over his land in pursuance of an agreement to convey a right of way to the company, provided it would put a good depot on the land at which all regular trains would stop, upon the company's failure to build the depot, cannot recover possession, but his remedy is an action for compensation. *Southern California Ry. Co. v. Slauson*, 138 Cal. 342 (71 Pac. Rep. 352; 94 Am. St. Rep. 58). Where a landowner has stood by and permitted a railroad company possessing the right of eminent domain to build and put in operation a line of road across his land, and thereby create large interests useful to the company and the public, without first having obtained the authority so to do by the exercise of the right of eminent domain or otherwise, he cannot maintain an action of ejectment against such company to recover the right of way occupied by it and necessary for the operation of such road. *Buckwalter v. Atchinson, T. & S. F. Ry. Co.*, 64 Kan. 403 (67 Pac. Rep.

831). See opinion for collation of authorities on this subject. The constitutionality of Minn. Gen. Stat. 1894, § 2661, providing for the recovery of a reasonable attorney's fee by plaintiff in an action of ejectment against a railroad company wrongfully appropriating land for a right of way, is again upheld in *Pfaender v. Chicago & N. W. Ry. Co.*, 86 Minn. 218 (90 N. W. Rep. 393), following *Cameron v. Railway Co.*, 63 Minn. 392 (65 N. W. Rep. 652; 31 L. R. A. 553). Plaintiff recovering in ejectment against a railroad company is entitled to recover as compensation for the use and occupation of the premises a reasonable compensation for any use to which it could have been put by the plaintiff, and a further sum to cover all damages upon the land by the defendant in constructing a roadbed for its railway track. *Illinois Cent. R. Co. v. Hoskins*, 80 Miss. 730 (32 So. Rep. 150; 92 Am. St. Rep. 612).

Sec. 179. Title necessary to maintain—Proof of title.

In North Carolina the plaintiff may recover on an equitable title. *Westfeldt v. Adams*, 131 N. C. 379 (42 S. E. Rep. 823). In Missouri ejectment can not be maintained upon a title which is merely equitable. *Nalle v. Parks*, 173 Mo. 616 (73 S. W. Rep. 596); *Nalle v. Thompson*, 173 Mo. 595 (73 S. W. Rep. 599). In Georgia it is held that the doctrine that a plaintiff may recover on an equitable title, where such title amounts to a perfect equity, applies only where such equity arises out of a transaction between vendor and vendee, and after full payment of the purchase money. *Thomas v. Walker*, 115 Ga. 11 (41 S. E. Rep. 269). The plaintiff must recover on the strength of his own title, and where he claims under a paper title the fact that the defendant claims title by adverse possession does not relieve the plaintiff of establishing his paper title. *Troth v. Smith*, 68 N. J. L. 36 (52 Atl. Rep. 243). Under Bal. Ann. Wash. Codes & Stat. §§ 5500, 5508, it is not necessary for a plaintiff to show a legal title, but only a title, legal or equitable, superior to that of defendant, *State v. Johanson*, 26 Wash. 668 (67 Pac. Rep. 401). Until a plaintiff shows title, the defendant's possession is presumed to be rightful. *Goforth v. Snigily*, 79 Miss. 398 (30 So. Rep. 690). In Connecticut a mere possessory right is not sufficient to maintain the action, but the plaintiff must show legal title. *Cahill v. Cahill*, 75 Conn. 522 (54 Atl. Rep. 201; 60 L. R. A. 706); but in Alabama proof of prior possession alone is sufficient to

authorize a recovery against a mere trespasser, *Barrett v. Kelly*, 131 Ala. 378 (30 So. Rep. 824). In South Dakota it is held that in order for one to maintain ejectment against a defendant in actual adverse possession of a town lot, on the ground of a prior possession, it is necessary for him to show that the premises were inclosed by a good, substantial fence, kept in good repair up to the time of defendant's entry, or by actual residence upon, or occupancy of the premises by himself or tenant, with the boundaries of the premises well defined, and so continued up to the time of the defendant's alleged entry. *Pendo v. Beakey*, 15 S. Dak. 344 (89 N. W. Rep. 655).

Where both parties claim from a common source, it is not necessary to trace the title from the United States, nor inquire into the title of such common grantor, *Horswill v. Farnham*, S. Dak. (92 N. W. Rep. 1082); *Bradley v. Lightcap*, 201 Ill. 511 (66 N. E. Rep. 546); and in the last case it is held that the admission of evidence back of the common source of title is harmless. *Hurd's Ill. Rev. Stat.* 1899, p. 729, construed and applied—affidavits of parties as to title from common source—effect. *Bradley v. Lightcap*, 201 Ill. 511 (66 N. E. Rep. 546). See, on this subject, *Brown v. Schintz*, 203 Ill. 136 (67 N. E. Rep. 767). Partition proceedings for the division of lands among heirs, under which commissioners appointed to partition the lands went upon the same, assigned the shares, and made their report in writing to the court, which was duly confirmed and recorded, were held to be such an open public declaration of the right to possession by the agents or representatives of the heirs as to be tantamount to an occupation by them, and therefore sufficient to sustain a paper title asserted by a plaintiff in ejectment claiming thereunder and who was required to trace his title back to some one in possession. *Troth v. Smith*, 68 N. J. L. 36 (52 Atl. Rep. 243). Va. Code. §§ 2730, 2748, construed and applied—particular estate held not sufficient to sustain ejectment. *King v. Norfolk & W. Ry. Co.*, 99 Va. 625 (39 S. E. Rep. 701).

Sec. 180. Complaint in ejectment. A declaration in ejectment is demurrable when it fails to set forth the title of the plaintiff to the premises in question so explicitly that a judgment in his favor will determine the character of his estate, and not simply his right of possession, and such a

defect is not cured by a judgment rendered on default. *Dunn v. Sullivan*, 23 R. I. 605 (51 Atl. Rep. 203). In Minnesota it is sufficient for the plaintiff to allege in his complaint that he is the owner and entitled to the possession of the land therein described, without further allegation as to the nature, quality, or kind of ownership relied upon. *Atwater v. Spalding*, 86 Minn. 101 (90 N. W. Rep. 370; 91 Am. St. Rep. 331). A complaint alleging all the facts required by Wis. Rev. Stat., § 3077, which also alleges that the defendant claims title through a "pretended deed" of a certain date from plaintiff to S., but which was "never executed or delivered" by the plaintiff, is sufficient to withstand a demurrer *ore tenus*. *Wisconsin Lakes Ice & Cartage Co. v. Pike & North Lakes Ice Co.*, 115 Wis. 377 (91 N. W. Rep. 988). A complaint seeking to recover possession of a certain levee constructed across certain lots, which describes the same as a certain strip or parcel of land 60 feet wide, running north and south, through certain lots (which are described), "which parcel or strip of land has been used for a levee," was held to sufficiently describe the premises sought to be recovered. *Driver v. Board of Directors of St. Francis Levee Dist.*, 70 Ark. 358 (68 S. W. Rep. 26). For construction and application of Mansf. Ark. Dig., §§ 4940, 5086 (Ind. Ter. Ann. Stat. 1899, §§ 578, 3149, 3291), and discussion of sufficiency of complaint in action of ejectment by Cherokee Nation against noncitizens, see *Hargrove v. Cherokee Nation*, Ind. Ter. (69 S. W. Rep. 823).

Sec. 181. Defenses in ejectment. A tenant may show title by adverse possession under the general denial. *Shelton v. Wilson*, 131 N. C. 499 (42 S. E. Rep. 937). In Missouri the defendant can show that a deed in the plaintiff's chain of title is a forgery, and thereby show that the plaintiff is not entitled to possession. *Patton v. Fox*, 169 Mo. 97 (69 S. W. Rep. 287). The presumption of payment of the mortgage debt arising from lapse of time is not available to a stranger to the title to defeat an action of ejectment brought to enforce a mortgage; nor can such action be defeated by proof of adverse possession begun after the giving of the mortgage and not amounting to title. *Glezen v. Haskins*, 23 R. I. 601 (51 Atl. Rep. 219). A person occupying a part of a street with poles and appliances for lighting the street, in pursuance of a con-

tract made with the municipal authorities, under N. J. P. L. 1894, p. 477, has such rightful, exclusive possession of the part so occupied as will support a plea of not guilty in an action of ejectment brought by an abutting owner having title to the fee in the street; but the right of such a person to use the street in the immediate vicinity of his poles and appliances for the purpose of maintaining them is not capable of supporting such a plea. *French v. Robb*, 67 N. J. L. 260 (51 Atl. Rep. 509; 57 L. R. A. 956; 91 Am. St. Rep. 433). See opinion for history of action of ejectment. In Alabama the action may be defeated by proof of a superior outstanding title in a third person, where the defendant does not sustain any relation to the plaintiff which estops him from denying the plaintiff's title. *Bromberg v. Smee*, 130 Ala. 601 (30 So. Rep. 483).

In Alabama an equitable estoppel is not available as a defense. *Williams v. Armstrong*, 130 Ala. 389 (30 So. Rep. 553). In Virginia it is held that an action of ejectment can be neither maintained nor defended by reliance upon a mere equitable estoppel. *Haney v. Breeden*, 100 Va. 781 (42 S. E. Rep. 916). In Illinois, an estoppel in pais affecting a permanent interest in land can be availed of only in a court of equity, and cannot be invoked, in an action of ejectment, to prevent the assertion of legal title. In ejectment, legal titles alone can be considered. *Grubbs v. Boon*, 201 Ill. 98 (66 N. E. Rep. 390); *Wakefield v. Van Tassell*, 202 Ill. 41 (66 N. E. Rep. 830; 95 Am. St. Rep. 207).

Sec. 182. Evidence and instructions. A record introduced by the plaintiff in an action of ejectment against the widow and children of a decedent showing that the plaintiff purchased the land at an execution sale on a judgment against the decedent's administrator, is prima facie evidence that the decedent died intestate and that the children were his heirs. *McCormick v. Skelly*, 201 Pa. St. 184 (50 Atl. Rep. 765). Where one proves title under a patent regular on its face and issued under a law authorizing its issuance, evidence of irregularity accompanying its issuance cannot be given by a defendant who does not connect himself with the paramount source of title or assert superior equities to the legal title, but who claims by adverse possession. *Phillips v. Carter*, 135 Cal. 604 (67 Pac. Rep. 1031; 87 Am. St. Rep. 152). Where, in ejectment brought by a purchaser at a mortgage foreclosure sale against the heir of the mortgagor, the latter relies on title by adverse

possession, it is prejudicial error to admit evidence of acts of adverse possession occurring prior to the foreclosure decree. *Reagan v. Hodges*, 70 Ark. 563 (69 S. W. Rep. 581). As against a defendant claiming by adverse possession a plaintiff who claims under a mortgage may show that the first mortgage which conveyed only a life estate was reformed so as to convey a fee, and in pursuance of such decree a second mortgage was given as of the date of the first. *Glezen v. Haskins*, 23 R. I. 601 (51 Atl. Rep. 219). Where a plaintiff relies on title by adverse possession he may prove his execution of leases to parcels of land not in controversy, but within the boundaries of the tract claimed by such possession; but the lessees are competent witnesses for the defendant to show that they claimed the land as their own. *South v. Deaton*, Ky. (68 S. W. Rep. 137; 24 Ky. Law Rep. 196). For particular case as to the proof required and evidence admissible in an action by the state of Ohio to recover canal lands, see *State v. Cincinnati Tin & Japan Co.*, 66 O. St. 182 (64 N. E. Rep. 68). For cases determining particular questions as to the admissibility of evidence and the applicability of instructions, see *Anniston City Land Co. v. Edmondson*, 127 Ala. 445 (30 So. Rep. 61); *Stalford v. Goldring*, 197 Ill. 156 (64 N. E. Rep. 395); *Carpenter v. Carpenter*, 130 Mich. 213 (89 N. W. Rep. 717); *Maxwell v. Kent*, 49 W. Va. 542 (39 S. E. Rep. 174).

Sec. 183. Practice in ejectment—Miscellaneous notes.

The common law rule that an action of ejectment abates upon the death of the defendant has not been changed by the statutes of Connecticut. *Merwin v. Merwin*, 75 Conn. 8 (52 Atl. Rep. 614). The disputed rights of occupants of lands claiming under a will which devises only a legal title may be determined in an action of ejectment, without a previous suit in equity to construe the will. *Head v. Phillips*, 70 Ark. 432 (68 S. W. Rep. 878). Where an officer fails fully to execute a writ of restitution on account of the ill health of the defendant's wife, the judgment is unsatisfied, and the office of the writ is unperformed. *Dieckman v. Weirich*, (Ky.) 73 S. W. Rep. 1119 (24 Ky. Law Rep. 2340). In ejectment to recover a railroad right of way on account of the abandonment of the road, brought against a company operating and in possession of the road under an arrangement giving it these rights, made with the company originally obtaining the right of way, it

is not necessary to make such original company a defendant. 2 Starr & C. Ann. Ill. Stat., p. 1610, § 6; p. 1614; §§ 17, 18, construed and applied. *Chicago & E. I. R. Co. v. Clapp*, 201 Ill. 418 (66 N. E. Rep. 223). In Indiana, when a mortgagee receives a deed in pursuance of his purchase of the mortgaged premises under a foreclosure of his mortgage, he is entitled to possession of the property, and the withholding of such possession by the mortgagor is unlawful by operation of law, rendering proof that such possession is unlawful unnecessary. *Brown v. Cox*, 158 Ind. 364 (63 N. E. Rep. 568). An order transferring an action in ejectment to the equity docket because of equitable defenses raised in an answer will not preclude the moving party from demanding that the purely legal issues be tried by jury, if his request for jury trial is timely and is insisted upon. See opinion as to what constituted waiver of jury and effect. *Schumacher v. Crane-Churchill Co.*, Neb. (92 N. W. Rep. 609). The fact that a complaint in an action of ejectment asks for an injunction against waste pending the litigation, and that on final hearing the injunction be made permanent, does not convert it into an equitable action so as to deprive the plaintiff of the right to a jury trial. *Haggin v. Kelley*, 136 Cal. 481 (69 Pac. Rep. 140). A finding, as a conclusion of law, that the defendant is entitled to possession until payments due him for improvements have been made, is neutralized by a finding that his detention of the land is unlawful, and does not authorize a judgment for him. *Moffitt v. Rosencrans*, 136 Cal. 416 (69 Pac. Rep. 87). Where, in ejectment brought by a grantee, it appears that his deed is void as to the defendant because executed while the latter was in adverse possession of the land, an amendment making the plaintiff's grantors plaintiffs, for the use of their grantee, operates as an entire change of parties, and is not permissible under Ala. Code, § 29. *Reese v. Reaves*, 131 Ala. 195 (31 So. Rep. 447). Applying Wis. Rev. Stat., 1898, §§ 3084, subd. 7, 3086, it is held that where an action of ejectment is tried by the court without a jury and plaintiff recovers, both the finding and judgment must specify the estate established by him. *Barenek v. Barenek*, 113 Wis. 272 (89 N. W. Rep. 146). When defendant in an action of ejectment claims title based on a tax deed, and also upon a decree quieting title in his antecedent grantor in possession under such tax deed, and in an action to which

plaintiff was a party, the validity or invalidity of the tax deed is not material unless the decree quieting title is absolutely null and void, and subject to the collateral attack made in the ejectment action. *Priest v. Robinson*, 64 Kan. 416 (67 Pac. Rep. 850).

EMINENT DOMAIN.

EPITOME OF CASES.

Sec. 184. Right of eminent domain—Constitutionality and construction of statutes. A statute (Vt. Laws 1894, No. 165, § 55, subd. 14, as amended by Laws 1896, No. 145, § 3) which authorizes a city council to condemn property for water supply purposes, but leaves to it the exclusive right to determine the necessity and amount of the taking, without any right of appeal on these questions, is unconstitutional. *Stearns v. City of Barre*, 73 Vt. 281 (50 Atl. Rep. 1086; 58 L. R. A. 240; 87 Am. St. Rep. 721). For a discussion of the constitutionality of drainage laws, see *Mound City Land & Stock Co. v. Miller*, 170 Mo. 240 (70 S. W. Rep. 721; 60 L. R. A. 190; 94 Am. St. Rep. 727). Applying Ala. Const. 1875, art. 14, § 7, it is held that the power of a city to enlarge and improve sidewalks does not give it the right when engaged in that work to injure a stone wall enclosing an abutting owner's lot, without first making just compensation for such injury. *Niehaus v. Cooke*, 134 Ala. 223 (32 So. Rep. 728). The power given a railroad company by its charter (Md. Laws 1831, ch. 288) to appropriate land for the construction and repair of its road, not exceeding 100 feet in width, is not exhausted by the appropriation of a strip 70 feet wide; nor is its right to condemn property barred after ten years on account of a provision in its charter that its road must be constructed within that time. *Hopkins v. Philadelphia, W. & B. R. Co.*, 94 Md. 257 (51 Atl. Rep. 404). A statute (Pa. Laws 1885, p. 29) giving a natural gas company "the right of eminent domain for the laying of pipe lines for the transportation and distribution of natural gas," does not include the incidental right to construct and maintain, on the

same right of way, a telegraph or telephone line to be used only in the necessary operation of the pipe line. *Woods v. Greensboro Nat. Gas Co.*, 204 Pa. St. 606 (54 Atl. Rep. 470).

Sec. 185. As to what constitutes a public use. One who seeks to appropriate a railroad right of way to sell, merely, is not in charge of a public use. *Beveridge v. Lewis*, 137 Cal. 619 (70 Pac. Rep. 1083; 59 L. R. A. 581; 92 Am. St. Rep. 188). Construing and applying Colo. Const., art 2, § 14; *Mills' Ann. Colo. Stat.*, § 1716, it is held that a corporation organized to procure and maintain a reservoir for the storage and use of water for water power, irrigation, mining, milling, manufacturing, and other beneficial uses and purposes may condemn land for such reservoir. *Denver Power & Irr. Co. v. Denver & R. G. R. Co.*, 30 Colo. 204 (69 Pac. Rep. 568; 60 L. R. A. 383). A statute (1 Starr & C. Ann. Ill. Stat., p. 692) giving cities power to alter or widen their streets, authorizes an appropriation of land to widen a street so as to provide a suitable means of access to a subway required to be constructed under a railroad crossing the street on account of an ordinance requiring the elevation of its tracks, although by the terms of the ordinance the railroad paid all the expenses. *Summerfield v. City of Chicago*, 197 Ill. 270 (64 N. E. Rep. 490). To authorize the appropriation of land by a gas company for a pipe line, under *Burns' Ind. Rev. Stat.*, § 5103, it must show that it is engaged in furnishing gas to the public; it is not enough to allege that the real estate is necessary for its pipe line from its wells to a city. *Great Western Nat. Gas & Oil Co. v. Hawkins*, 30 Ind. App. 557 (66 N. E. Rep. 765). See opinion for exhaustive discussion of the necessity of a public use to authorize the exercise of the right of eminent domain. The construction of a levee along the bank of a river is a public use. *Kan. Laws 1893. ch. 104, p. 180*, held constitutional. *Missouri, K. & T. Ry. Co. v. Cambern*, 66 Kan. 365 (71 Pac. Rep. 809). The provisions of the N. Y. Railroad Laws (*Laws 1892, ch. 565*), authorizing the condemnation of land for railroad purposes, do not authorize a railroad corporation having a completed road through an incorporated village to condemn for a new and straighter line through such village, to be used as a short cut and an additional main line. *Erie R. Co. v. Steward*, 170 N. Y. 172 (63 N. E. Rep. 118). The right to flow lands by the raising of a dam, when for "public

benefit," given by Vt. Stat., ch. 159, does not extend to giving the owner of a dam the right to raise it to generate electricity for the operation of a railroad. *Avery v. Vermont Electric Co.*, Vt. (54 Atl. Rep. 179; 59 L. R. A. 817). See opinion for discussion of this subject.

Sec. 186. Extent of power given a city to condemn land "for the use of the public parks." Power given a city to condemn land "for the purpose of public parks," authorizes an appropriation of land to extend a free library and art building standing on other land forming part of a public park. *Laird v. City of Pittsburg*, 205 Pa. St. 1 (54 Atl. Rep. 324; 61 L. R. A. 332). The court say: "A public park, in the popularly accepted meaning of the present time, may be comprehensively defined as a public pleasure ground. The definitions by the lexicographers do not vary much from this. Worcester calls it 'a piece of ground enclosed for public recreation or amusement;' Webster, 'a piece of ground, in or near a city or town, inclosed and kept for ornament and recreation;' the Century Dictionary, 'a piece of ground, usually of considerable extent, set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye as well as an opportunity for open air recreation.' No doubt the idea of open air and space, with the land kept in grass and trees, as if approximately in the state of nature, still inheres in the general understanding of the word, but it is no longer the dominating thought, as it formerly was. The chief amusements of the great body of our ancestors in England were in the open air, and a park meant for them practically a small or private forest, left in condition for the home of wild animals of the chase. Blackstone defines a park as 'an inclosed chase extending over a man's own grounds. The word "park" indeed, properly signifies an inclosure; but yet it is not every field or common which a gentleman pleases to surround with a wall or paling, and to stock with a herd of deer, that is hereby constituted a legal park; for the king's grant, or, at least, immemorial prescription, is necessary to make it so; though now the difference between a real park and such inclosed grounds is in many respects not very material, only that it is unlawful at common law for any person to kill any beasts of the park or chase, except such as possess these franchises of the forest, chase or park.' 2 Bl. Comm. 38.

With the change of manners and habits of the people came

also a change in their associations with the use of the words. The idea of a public park in or near a city as a place of resort of the public generally for recreation and amusement necessarily banished the idea of a home for wild beasts of the chase, even in a very modified state of nature. The trimming away of thickets and underbrush, the substitution of regular pathways, paved, and perhaps railed and artificially lighted, which would have been incongruous to our forefathers, now enter into the accepted idea of a park. The growth of sentiment of artistic adornment of public grounds and buildings is part of the history of our time and country. Public parks have come to be recognized as not only the natural place for walks and drives afoot, awheel, or with horse and carriage, for boating, skating, and other outdoor athletics, but also as the appropriate and most effective location for monuments and statues, either to historic heroes or to pure art, fountains, flower displays, botanical and zoological gardens, museums of nature and of art, galleries of painting and sculpture, music stands and music halls, and all other agencies of aesthetic enjoyment of eye and ear. The parks of cultivated Europe are filled with works of art, and the great cities of this country are following fast in the same direction. Schenley Park in Pittsburg, with which this case is immediately concerned, already devotes a portion of its space, as found by the court below, to the Phipps Conservatory of flowers, to music stands, and the Carnegie Free Library Building, as well as to athletic grounds and a race course. The Carnegie Free Library Building, as also found by the court below, contains a free library, an art gallery, museum, and music hall, all free to the public.

The power to take by eminent domain is expressed in the statutes to be 'for the purpose of public parks.' No further legislative definition is given, and it must be assumed that the words are used according to their general understanding. This, as already indicated, includes all the customary forms of the use of land as a public pleasure ground. The Free Library Building, as already said, contains an art gallery, museum, and music hall, besides a free library. The latter is as much devoted to the public recreation as the other parts. It affords a place of resort and entertainment for the public at large in rainy and inclement weather, and at all times for those who prefer quiet study to sight-seeing or more active amusement. It may be conceded, as argued by appellants, that a library, in itself, is not an intergal part of the park, and,

were the taking here complained of a taking directly and solely for a library site, a different question would be presented. But a library occupying only a very small fraction of the park area, not interfering at all substantially with its open air and free space, does not differ in legal effect from the museums, picture galleries, music stands and other incidental means of promoting the entertainment and pleasure of the people. Should the city, therefore, decide to devote the land now in controversy to the enlargement of the Free Library Building, it could not be fairly said to be a use outside of what is legitimately implied in the authority to take for a public park. We have not found or been furnished with any case on the exact point here raised, but the analogous principles applicable to the use of a public square in a town plot are discussed in *Commonwealth v. Connellsville*, 201 Pa. St. 154 (50 Atl. Rep. 825), and cases there cited."

Sec. 187. As to what constitutes a taking of property.

Injury to a property owner's easement of light, air and access constitutes a taking of property for which he is entitled to compensation, *State v. Superior Court*, 30 Wash. 232 (70 Pac. Rep. 484); but in Illinois it is held that the fact that the crossing of a street by an elevated railroad near an expensive apartment house obstructs the view and passage to the premises, and that the noise destroys the peace and quiet of the premises, does not constitute a taking or damaging of such private property for public use, within the meaning of Ill. Const., art. 2, § 13, providing that "private property shall not be taken or damaged for public use without just compensation." *Aldrich v. Metropolitan W. S. El. R. Co.*, 185 Ill. 456 (63 N. E. Rep. 155). The erection by a municipal corporation of a culvert across a public road in such a manner as to obstruct and destroy the use of a private right of way across land adjoining the road constitutes a taking of property and gives the owner of the right of way a right to damages. *De Lauder v. Commissioners of Baltimore Co.*, 94 Md. 1 (50 Atl. Rep. 427). A business is held not to be property within the meaning of Mass. Stat. 1895, ch. 488, § 15, providing that any person whose "property is taken under the right of eminent domain or entered upon or injured" may demand a jury to determine the damages. *Sawyer v. Commonwealth*, 182 Mass. 245 (65 N. E. Rep. 52; 59 L. R. A. 726). In West Virginia it is held that the erection of telephone poles along the streets

of an incorporated city, town, or village, with the consent of the council thereof, is not such a taking of private property for public use as will authorize the abutting lot owner to enjoin the prosecution of such work until his damages occasioned thereby are paid or secured to be paid. *Maxwell v. Central District & Printing Tel. Co.*, 51 W. Va. 121 (41 S. E. Rep. 125).

Sec. 188. What property may be taken. School lands granted to the state of Idaho may be taken under the right of eminent domain. *Ida. Stat. 1887, § 5212*; *Laws 1899, p. 381*, applied. *Hollister v. State*, *Ida.* (71 Pac. Rep. 541). A railroad company taking title to land upon condition subsequent, which title has become forfeited by the exercise of an option reserved to the grantors and their assigns, may afterward condemn such land for the purposes of its railroad. 2 N. J. Gen. Stat., p. 2685, construed and applied. *State v. Baltimore & N. Y. Ry. Co.*, N. J. L. (53 Atl. Rep. 1040). A temporary interest in land may be appropriated under a statute (*N. J. Pub. Laws 1895, p. 769*) authorizing cities to take by condemnation, in procuring a public water supply, "land, water, water rights, or other property." *State v. Mayor, etc., of City of Jersey City*, 67 N. J. L. 114 (50 Atl. Rep. 598). Citing *In re Thompson*, 57 Hun, 419 (10 N. Y. Supp. 705); *Tyler v. Hudson*, 147 Mass. 609, 612 (18 N. E. Rep. 582); *Jerome v. Ross*, 7 Johns. Ch. 315 (11 Am. Dec. 484).

Sec. 189. Condemnation of land already appropriated to a public use. Construing and applying *Mont. Code Civ. Proc., § 2214, subd. 3*, it is held that water appropriated for irrigation purposes may be condemned for the purpose of procuring a city water supply, where the use for which it is to be taken is more necessary than the existing use; but the complaint asking for such an appropriation must allege facts showing the superiority of such necessity. *City of Helena v. Rogan*, 26 Mont. 452 (68 Pac. Rep. 798).

An hydraulic company, organized under *Burns' Ind. Rev. Stat., § 4827 et seq.*, which first files an instrument of the appropriation of real estate in accordance with the statute, may appropriate thereunder property acquired by purchase by a similar corporation which has not filed an instrument of appropriation, though the latter corporation is an older or-

ganization and acquired the property for the construction of similar works. *Indiana Power Co. v. St. Joseph & E. Power Co.*, 159 Ind. 42 (63 N. E. Rep. 304). The court say: "It is said in *Mills, Em. Dom.* (2d Ed.) § 47, that: 'It does not signify that the articles of incorporation of one are prior in date to those of another, or that one has made preliminary surveys over a particular route, or has made purchases of individuals along that route. Until the survey is made and filed, the company would hold the land purchased as any other individual landowner, and such land could be condemned by the rival company upon compensation. The priority of construction gives no rights where another company has perfected its location first.' *Railroad Co. v. Blair*, 9 N. J. Eq. 635; *Titusville & P. C. R. Co. v. Warren & V. R. Co.*, 4 Leg. Gaz. 117; *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. 1. Again, it is said in the law of *Eminent Domain* (Randolph; 1894): 'Where one has purchased property with the intention of putting it to public use, he cannot be divested of it by a party seeking to condemn it for a similar use; but the purchase, to be effective, must be consummated before a location is made under the eminent domain. Where a corporation duly filed a survey of property required, and another corporation afterwards recorded a deed from the owner, executed in pursuance of an unrecorded agreement made before the survey, priority was given to the first corporation because it was not affected with notice of the agreement. * * * Where the conflict is between parties seeking to condemn, that one shall prevail who first makes the location in accordance with the statute.' *Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.*, 127 Ind. 369 (24 N. E. Rep. 1054; 26 N. E. Rep. 893; 8 L. R. A. 539); *Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co.*, 110 N. Y. 128 (17 N. E. Rep. 680); *Waterworks Co. v. Bird*, 130 N. Y. 249 (29 N. E. Rep. 246); *Railroad Co. v. Alling*, 99 U. S. 463 (25 L. Ed. 438). And in *Lewis, Em. Dom.* (2d Ed.) § 306, pp. 753, 754, the general doctrine is thus stated: 'As to what is such a completed location as to secure priority must depend largely upon local statutes. We should say, in general, that it includes everything necessary to perfect the right to proceed to condemn the property. * * * Where priority of right has been secured by priority of location, it cannot be defeated by a rival company agreeing with the owners and purchasing the property.' The opinion of Shiras, J., in *Sioux City & D. M. R. Co.*

v. Chicago, M. & St. P. Ry. Co., (C. C.) 27 Fed. Rep. 770, has been commended as a very clear and forcible statement of the principles applicable in cases of conflicting claims to priority: 'It is certainly equitable that a company which, in good faith, surveys and locates a line of railway, and pays the expenses thereof, should have a prior claim for the right of way for at least a reasonable time. The company does not perfect its right to the use of the land, as against the owner thereof, until it has paid the damages, but, as against a railroad company, it may have a prior right, and better equity. The right to the use of the right of way is a public, not a private, right. It is, in fact, a grant from the state; and, although the payment of the damages to the owner is a necessary pre-requisite, the state may define who shall have the prior right to pay the damages to the owner, and therefore acquire a perfected title to the easement. The owner can not, by conveying the right of way to A., thereby prevent the state from granting the right to B. All that the owner can demand is that his damages shall be paid; and, subject to the right of compensation to the owner, the state has the control over the right of way, and can, by statute, prescribe when, and by what acts, the right thereto shall vest, and also what shall constitute an abandonment of such right.' The organization of appellant as a corporation under the act for the incorporation of hydraulic companies, the recording of the articles of association, the selection of the site of the dam, the acquisition of the premises intended for the dam by deeds from the owners, did not, in our opinion, operate as a grant of those lands or of any interest in them by the state to the corporation, nor impress upon them any public use. On the contrary, the appellant was at liberty to sell such lands in fee simple, to subdivide them, and to apply them to any private use whatever."

Sec. 190. Condemnation of land already appropriated to a public use—Lands appropriated by a railroad company. Under Starr & Curtis' Ill. Ann. Stat., p. 710, a city may acquire by condemnation a right to extend streets over and across the tracks, right of way and lands of railway companies. *Chicago & N. W. Ry. Co. v. City of Morrison*, 195 Ill. 271 (63 N. E. Rep. 96). Authority on the part of a municipality to extend a public street or highway over and across a railroad right of way is implied from the general grant of power to lay out and establish streets and highways; but such

authority is not implied and does not exist when the use of the right of way for railway purposes will be thereby essentially impaired or destroyed; in which event express legislative authority to so extend the street is necessary. *Minneapolis & St. L. R. Co. v. Village of Hartland*, 85 Minn. 76 (88 N. W. Rep. 423). A railroad right of way cannot be appropriated for another public use which would nullify its use as a right of way, except where a public exigency requires that it be taken; and the fact that a site desired by an irrigation company for a reservoir, located on a railroad right of way, is the only available site on the stream, and that the railroad company might procure an equally available location for its right of way elsewhere, does not authorize an appropriation of the right of way for such reservoir site. *Denver Power & Irr. Co. v. Denver & R. G. R. Co.*, 30 Colo. 204 (69 Pac. Rep. 568; 60 L. R. A. 383). In discussing this subject the court say: "Where, however, land is already devoted to a public use, it would be wholly unreasonable to permit it to be taken for another public use which would nullify and defeat the one to which it is already devoted, except in cases where the overwhelming necessities of the public were such that, in order to serve their need or supply their necessities, the taking of such property became necessary. Unless so limited, no rule governing the rights of those engaged in conducting a business for the benefit of the public could be formulated which would afford them protection against others desiring to also engage in the transaction of public business. While corporations engaged in business of a nature which requires them to serve the public are said to be public corporations, they are, in fact, but private enterprises, inaugurated for the benefit of their stockholders; and if one such corporation may take the property of another so as to deprive the latter of the use to which it is devoted, except public necessity demands such taking, there would be no reasonable limit to the conditions under which the power of eminent domain might be exercised. Without the limitation suggested, the most absurd results could follow. The second might take from the first, others take from the latter, and the first turn about and retake, and thus the process go on ad infinitum." The power to condemn land already appropriated to a public use must be conferred by the legislature in express terms or by necessary implication. The right given interurban street railways to cross intersecting highways and railroads does not purport to authorize the ap-

propriation of a railway right of way longitudinally in whole or in part; nor is such a power conferred by necessary implication, where it was merely claimed that, unless the railroad way was condemned, the street railway would be compelled to diverge from its right of way as surveyed and located to such an extent and in such a manner as will render hazardous, dangerous, and impracticable the construction of its lines and the operation of its cars. *Indianapolis & V. R. Co. v. Indianapolis & M. Rapid Transit Co.*, Ind. App. (67 N. E. Rep. 1013).

A railroad company may condemn for its right of way a part of the right of way of another railroad company not in use for railroad purposes and not necessary for the exercise of the corporate franchise of such other company. *Seattle & M. R. Co. v. Bellingham Bay & E. R. Co.*, 29 Wash. 491 (69 Pac. Rep. 1107; 92 Am. St. Rep. 907). The court say: "It was observed in *Mobile & G. R. Co. v. Alabama Midland Ry. Co.*, 87 Ala. 508 (6 So. Rep. 404): 'As a general proposition, it may be said that railroad companies organized under the general laws are authorized by the statutes to acquire by condemnation the right of way of another corporation, when essential to the accomplishment of their principal purposes, or when there is space for the tracks of parallel roads without obstructing the use of the same. The statutes have been so construed, and to that construction we adhere. *Armiston & C. R. Co. v. Jacksonville, G. & A. R. Co.*, 82 Ala. 297 (2 So. Rep. 710); *East & W. R. Co. v. East Tennessee, V. & G. R. Co.* 75 Ala. 275.' The principle is stated in *re City of Buffalo*, 68 N. Y. 167: 'In determining whether a power generally given is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent public use. If both uses may not stand together, with some tolerable interference, which may be compensated by damages paid; if the latter use, when exercised, must supersede the former—it is not to be implied from a general power given, without having in view a then existing and particular need therefor, that the legislature meant to subject lands devoted to a public use already in exercise to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift

of power made in general terms.' The following authorities are pertinent: *Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. Co.*, 35 Mich. 265 (24 Am. Rep. 545); *Colorado E. Ry. Co. v. Union Pac. R. Co.*, (C. C.) 41 Fed. Rep. 293; *Baltimore & O. S. W. R. Co. v. Board of Com'rs of Jackson Co.*, 156 Ind. 260 (58 N. E. Rep. 837); *Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, 76 Minn. 334 (79 N. W. Rep. 315). The necessity must always be shown when one railroad attempts to appropriate the property of another. This necessity was found by the court. This principle is stated in *Mobile & G. R. Co. v. Alabama Midland R. Co.*, 87 Ala. 508 (6 So. Rep. 404), as follows: 'A necessity, such as authorizes one railroad corporation to condemn a part of the right of way of another, does not mean an absolute and unconditional necessity, as determined by physical causes, but a reasonable necessity under the circumstances of the particular case, dependent upon the practicability of another route, considered in connection with the relative cost to one and probable injury to the other; and the right of condemnation is not made out unless the petitioning company shows that the cost of acquiring and constructing its road on any other route clearly outweighs the consequent damage which may result to the older company, not including the question of competition for the business of a manufacturing (or other large) establishments on the line of the proposed route.' "

Sec. 191.—Condemnation of land already appropriated to a public use—Telegraph and telephone lines along railroads. A landowner owning the fee and in possession of land over which there has been condemned an unused railroad right of way is entitled to recover compensation from a telegraph company constructing a telegraph line along the same, which is in no way beneficial to the railroad; and this right is not affected by condemnation proceedings against the railroad to which such owner was not made a party. *N. C. Code*, § 2010 construed and applied. *Phillips v. Postal Tel. Cable Co.*, 130 N. C. 513 (41 S. E. Rep. 1022; 89 Am. St. Rep. 868). In support of the first proposition, the court say: "The defendant again contends that its poles are located on the right of way of the railroad company (that is, its potential right of way), and as it has acquired its easement from the railroad company by condemnation proceedings under the Code, it owes no further duty to the owner of the land. We cannot

concur in this view. The land on which the poles are situated is not in the actual possession of the railroad company, and apparently never has been. On the contrary, it has been in constant cultivation by the plaintiff and those under whom he holds. The nature of the easement acquired by railroad companies under condemnation proceedings has been too recently considered by this court to require further discussion. *Shields v. Railroad Co.*, 129 N. C. 1 (39 S. E. Rep. 582). In that case the court says on page 4, 129 N. C., and page 583, 39 S. E.: 'It therefore seems to be the settled law in this state, so far as judicial construction can settle a question, that a railroad company by condemnation proceedings only acquires an easement upon the land condemned, with the right to actual possession of so much only thereof as is necessary for the operation of its road, and to protect it against contingent damages.' It is not contended that the lines of the defendant are in any degree essential to the operation of the railroad. On the contrary, it is stated in the opinion of the court in the proceedings under which the defendant claims to have acquired its easement that 'the railroad company denies altogether that any benefit or advantage can arise to it in the erection of the telegraph lines, and, on the contrary, avers that it is detrimental to it in the last degree.' *Postal Cable Tel. Co. v. Southern R. Co.*, (C. C.) 89 Fed. Rep. 190, 196. Under the circumstances, it is clear that the additional easement claimed by the defendant is an additional burden upon the land, for which the owner is entitled to just compensation. *Atlantic & P. Tel. Co. v. Chicago, R. I. & P. R. Co.*, 6 Bliss. 158 (Fed. Cas. No. 632); *Daily v. State*, 51 O. St. 348 (37 N. E. Rep. 710; 24 L. R. A. 724; 46 Am. St. Rep. 578); *Telegraph Co. v. Pearce*, 71 Md. 535 (18 Atl. Rep. 910; 7 L. R. A. 200); *Keasby, Electric Wires*, § 185. The Maryland case is an able and elaborate discussion of the entire question. The kindred question involving the same principle, of railroads upon streets, is fully considered in the well-known cases of *Story v. Railroad Co.*, 90 N. Y. 122 (43 Am. Rep. 146), and *Lahr v. Railway Co.*, 104 N. Y. 268 (10 N. E. Rep. 528), in which it was held that the abutting owners were entitled to compensation for the additional burden imposed upon the streets by the elevated roads. *White v. Railroad Co.*, 113 N. C. 610 (18 S. E. Rep. 330; 22 L. R. A. 627; 37 Am. St. Rep. 639), is also a well-considered case in our own Reports."

In Indiana, where a statute confers power on telegraph

companies to acquire by eminent domain "such real and personal estate as may be necessary and proper for the purpose of erecting and keeping in repair its lines of telegraph and buildings requisite for its operation," it is held, applying U. S. Rev. Stat., § 3964, which establishes all railroads as post roads, and § 5263, which gives to any organized telegraph company accepting the statute the right to construct and operate lines of telegraph over and along any post roads of the United States, that a telegraph company incorporated in Indiana may appropriate a right of way for its lines over and along the right of way of a railroad company, when such use will not materially interfere with the use for which the land was originally condemned by the railroad company. *Postal Tel. Cable Co. v. Chicago, I. & L. Ry. Co.*, 30 Ind. App. 654 (66 N. E. Rep. 919). Construing and applying Tex. Rev. Stat., arts. 698, 699, authorizing "corporations created for the purpose of constructing and maintaining magnetic telegraph lines" to appropriate the lands necessary for such constructions, "whether owned by private persons in fee or in any less estate, or by any corporation, whether acquired by purchase or by virtue of any provision in the charter of such corporation," it is held that a telegraph and telephone company has the same authority to condemn a necessary right of way over the land of a railroad company as over the land of others; and the fact that it could obtain a right of way over other property or in other ways will not bar such a condemnation. *Ft. Worth & R. G. Ry. Co. v. Southwestern Telegraph & Telephone Co.*, 96 Tex. 160 (71 S. W. Rep. 270; 60 L. R. A. 145). Where the charter of a corporation seeking to appropriate a right of way shows that it is a duly organized corporation under the laws of the state, its charter can not be collaterally attacked nor its motive in acquiring the line inquired into. And, applying Colo. Laws 1885, p. 358, it is held that the railroad can not successfully resist the condemnation of such right of way, unless it appears that its use was necessary to the maintenance and operation of its railroad and the lines of telegraph already erected thereon, or is needed for such purpose. *Union Pac. R. Co. v. Colorado Postal Tel. Cable Co.*, 30 Colo. 133 (69 Pac. Rep. 564). See opinion for discussion of these subjects. In probate court proceedings brought by a telegraph company, under Ohio Rev. Stat. 1892, §§ 3456-3459, for the purpose of appropriating to its use a part of the right of way of a railroad company organized under the laws of Ohio, it is necessary

and jurisdictional for that court to hear and determine, and so enter of record, that the easement sought to be appropriated by such telegraph company will not in any material degree interfere with the practical uses to which the railroad company is authorized to put such right of way. The burden of proof to establish that fact is upon the telegraph company, and, until the court has so determined, it is without jurisdiction to order an appropriation, and impanel a jury for the assessment of compensation to the railroad company. *Cleveland, C. C. & St. L. Ry. Co. v. Ohio Postal Tel. Cable Co.*, 68 O. St. 306 (67 N. E. Rep. 890; 62 L. R. A. 941.)

Sec. 192. Additional servitude—Walls to support a railroad—Telephone poles and lines—Electric railroads. The erection of walls in a street to support railroad tracks in order to provide a subway for the passage of the street thereunder, in conformity with an ordinance requiring the elevation of the railroad tracks, is not an unlawful diversion to the use of the railroad company. *Summerfield v. City of Chicago*, 197 Ill. 270 (64 N. E. Rep. 490). In West Virginia it is held that telephone poles and wires in a city street are not an additional burden, *Maxwell v. Central District & Printing Tel. Co.*, 51 W. Va. 121 (41 S. E. Rep. 125); but in North Dakota it is held that the use of a street for telephone poles is an additional servitude, against which an abutting owner having the fee may have an injunction until the constitutional provision in regard to compensation for taking or damaging property for public use has been complied with. *Donovan v. Allert*, 11 N. Dak. 289 (91 N. W. Rep. 441; 58 L. R. A. 775; 95 Am. St. Rep. 720). See opinion for exhaustive review of conflicting authorities on this subject.

In New York it is held, adhering to the case of *Craig v. Railroad Co.*, 39 N. Y. 404, that the use of a city street for the purposes of a street surface railroad operated by electric power imposes an added burden upon the property rights of the owners of the fee, subject to the public easement for street purposes. *Peck v. Schenectady R. Co.*, 170 N. Y. 298 (63 N. E. Rep. 357). See dissenting opinion for exhaustive collation of authorities holding the contrary. The construction and operation of an electric railway upon a country highway is not an additional burden, *Lonoconing, M. & F. Ry. Co. v. Consolidated Coal Co.*, 95 Md. 630 (53 Atl. Rep. 420); but in Ohio it is held that the construction and operation of an interurban rail-

road laid with T rails, entirely on the side of a public highway next to the abutting improved farms owned and occupied by the plaintiffs, and entirely between their lands and the traveled part of the highway,—the company having authority to run an unlimited number of cars and trains for the carrying of passengers, and the transportation of freight, express matter, and government mail,—is an additional burden on the public highway, and obstruction to and interference with the plaintiffs' easements and rights therein, not substantially different from those that are imposed by the construction and operation of steam railroads under like conditions. The construction and operation of an electric plant in connection with such railway, and on the same side of the traveled public roadway, for supplying heat, power, and light to consumers for profit, constitutes another additional burden, which is an invasion of the plaintiffs' property rights. *Schaaf v. Cleveland, M. & S. Co.*, 66 O. St. 215 (64 N. E. Rep. 145).

Sec. 193. Additional burden—Electric light poles.

Electric light poles and wires for the purpose of lighting the streets of a city are not an additional servitude on its streets, although they are used for private purposes. *Gulf Coast Ice Mfg. Co. v. Bowers*, 80 Miss. 570 (32 So. Rep. 113). The court say: "The authorities are quite uniform that a city or town may light its streets as a means of making them more safe and convenient for public travel. The right to light the town is presumed to have been acquired and paid for, as incident to the right of public passage, when the property was condemned or dedicated for public use. In other words, the taking of the land for use as a street includes not only the right of passage, but of securing a convenient and safe passage; to light it, if you please, for that purpose. It is not a new taking of property for public use, but a completing to that extent of the uses of the first taking by adding appliances included within it, and now constructed by reason of the public need. *Keasby, Electric Wires* (2d Ed.) §§ 29, 76, 77, 82, 84; *Lewis, Em. Dom.* (2d Ed.) § 126; *Palmer v. Electric Co.*, 158 N. Y. 231 (52 N. E. Rep. 1092; 43 L. R. A. 672); *In re Public Lighting*, 150 Mass. 592 (24 N. E. Rep. 1084; 8 L. R. A. 487); *City of Newport v. Newport Light Co.*, 84 Ky. 166. While the lighting of the streets of a city may be a great convenience to the traveling public, especially under some conditions, the poles, wires and other necessary appliances for so do-

ing are often a positive inconvenience to the abutting landowner, considered merely as such. But the proprietary rights of the landowner, whether the fee or a mere easement thereon be in the public—*Theobald v. Railway Co.*, 66 Miss. 279 (6 So. Rep. 230; 4 L. R. A. 735; 14 Am. St. Rep. 564),—are greatly modified by the rights of the public, which is entitled to a free passage over the street, and to the benefit of lights constructed and operated for that end. And if a town or city may light its streets, as being an object for which the street is opened, without paying the abutting property owner damages for the erection of needed appliances therefor, it must follow that the municipal authorities may authorize some other person to furnish such lights. *Keasby, Electric Wires* (2d Ed.) § 111; *Johnson v. Electric Co.*, 54 Hun, 469 (7 N. Y. Supp. 716). It is said the poles and wires of appellant are unsightly, and are a disfigurement to the property, and an especial injury in that it obstructs the open view of the sea. Similar erections in all cities and towns present, though perhaps in a less degree, like inconveniences to the owners of palatial residences, but disfigurements of this kind to property are not the subjects of compensation, or, if so, they are conclusively presumed to have been paid for upon the opening of the street and its dedication to public use.

It is further said that the poles used by appellant are green pine poles, with the bark peeled, and, from rapid decay, are dangerous, and not lightwood poles, as required by the city ordinances; but this grievance, if true, is not made a subject of controversy under the allegations of the bill of complaint herein, which are not framed to present it. It is also complained that the electric light system of appellant is partly used for private purposes, but it appears from the record that all the poles set by appellant are necessary for executing the objects of public convenience, and in such case a mandatory injunction is not an appropriate remedy. *Johnson v. Electric Co.*, 54 Hun, 469 (7 N. Y. Supp. 716); *Keasby, Electric Wires* (2d Ed.) § 30."

But in Ohio it is held that the placing by a private lighting company of poles at the curb in a street, and the stringing thereon of electric light cable lines and wires for the purpose of furnishing light and energy to private takers, though done with the consent of the municipal authorities, constitutes an additional servitude and is the taking of the property of the

abutting owner, within the meaning of § 19, of the Ohio Bill of Rights. *Callen v. Columbus Elec. Light Co.*, 66 O. St. 166 (64 N. E. Rep. 141; 58 L. R. A. 782). The court say: "Coming now to the question of taking, it is to be admitted that it has been held necessary to the idea of a taking that there must be an exclusive appropriation; a physical, tangible appropriation of the property of another; a taking the property altogether. This is the doctrine announced in *Hurt v. City of Atlanta*, 100 Ga. 274 (28 S. E. Rep. 65), and some other cases. But the rule more frequently held, and we think the more enlightened rule, is that this limitation of the term 'taking' to the actual physical appropriation of the corpus is too narrow a construction to meet the demands of justice, and that, from the very nature of the right of user and exclusion, it is evident that they can not be materially abridged without necessarily taking the owner's property; for, if the right of user is an essential element of ownership, then whatever physical interference annuls this right takes property. See *Lewis, Em. Dom.* § 58; *Pearsoll v. Supervisors*, 74 Mich. 558 (42 N. W. Rep. 77; 4 L. R. A. 193); *Booming Co. v. Jarvis*, 30 Mich. 308; *Eaton v. Railroad*, 51 N. H. 504 (12 Am. Rep. 147); *Thompson v. Improvement Co.*, 54 N. H. 545; *Arimond v. Canal Co.*, 31 Wis. 316. The doctrine is not better stated than by the supreme court of the United States (opinion by Mr. Justice Miller) in *Pumpelly v. Canal Co.*, 13 Wall. 166 (20 L. Ed. 557), in discussing the law of eminent domain: 'The constitutional provisions of the United States and of the several states which declare that private property shall not be taken for public use without just compensation were intended to establish this principle beyond legislative control. It is not necessary that property should be absolutely taken, in the narrowest sense of that word, to bring the case within the protection of this constitutional provision. There may be such a serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the constitution.' And when we hold, as we do, that the property interest which is here defined as protected by the constitution (article 1, section 19), which provides that private property shall ever be held inviolate, and when taken for public use, except in time of war or other public exigency, compensation therefor shall first be made in money, or first secured by a deposit of money, as well as by section 5 of article 13, which provides that 'no right of way shall be appropriated to the use of any corporation until

full compensation therefor be first made in money, or first secured by a deposit of money,' etc., we but follow the law as laid down by our predecessors in the cases cited, and followed in many adjudications in recent years. And if the owner's right in the street be property, as hereinbefore defined, and as is protected by the constitution, it inevitably follows that the attempt by a private corporation, in order to accomplish its own private business purposes, to invade that right by placing in the street in front of the lot permanent erections, which will in any appreciable degree impair the owner's access to the lot, or otherwise interfere with the full enjoyment of the lot for all purposes to which it is adapted, or of the street itself, such an invasion is an attempted taking. It is a diversion of the use of the street from the purposes originally designed for it, and if it can be taken at all, as against the will of the owner, it must be upon the terms prescribed by the constitution. To the Ohio decisions already cited may be added as bearing generally on the subject: *Cincinnati Inclined Plane Ry. Co. v. Telegraph Ass'n*, 48 O. St. 390 (27 N. E. Rep. 890; 12 L. R. A. 534; 29 Am. St. Rep. 559); *Railway Co. v. Campbell*, 51 O. St. 328 (37 N. E. Rep. 266); *Daily v. State*, 51 O. St. 348 (37 N. E. Rep. 710; 24 L. R. A. 724; 46 Am. St. Rep. 578); *Kramer v. Railway Co.*, 53 O. St. 436; also *Craig v. Railroad Co.*, 39 N. Y. 404; *Dill. Mun. Corp.* § 698a; *Backus v. City of Detroit*, 49 Mich. 110 (13 N. W. Rep. 380; 43 Am. Rep. 447); *Pierce, R. R.* 241; *Broome v. Telegraph Co.* 42 N. J. Eq. 141 (7 Atl. Rep. 851); *Palmer v. Electric Co.*, 158 N. Y. 231 (52 N. E. Rep. 1092; 43 L. R. A. 672); *Carpenter v. Electric Co.*, 178 Ill. 29 (52 N. E. Rep. 973; 43 L. R. A. 645; 69 Am. St. Rep. 286); *Light Co. v. Hart*, 1 Pa. Dist. R. 571; *Tiffany v. Illuminating Co.*, 51 N. Y. Super. Ct. 280; *Crow. Electricity*, § 126; and *Lewis, Em. Dom.* § 131."

Sec. 194. Compensation for property taken as a prerequisite to the taking—Deposit of money in court pending condemnation proceedings. Private property can not be taken for a public use, either directly or indirectly, without compensation, though there is no clause in the constitution of the state expressly forbidding it. Such taking is prohibited by the fourteenth amendment to the constitution of the United States. *Phillips v. Postal Tel. Cable Co.*, 130 N. C. 513 (41 S. E. Rep. 1022; 89 Am. St. Rep. 868). *Cal. Code Civ. Proc.*, § 1254, authorizing the condemning party to take possession dur-

ing the condemnation proceedings, on order of court, upon his paying into court or giving security therefor, sufficient money to compensate the defendant in case the land is finally taken, or for damages if for any reason the land be not taken, is held unconstitutional, as violating Const., art. 1, § 14, providing that "private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner." *Steinhart v. Superior Court*, 137 Cal. 575 (70 Pac. Rep. 629; 59 L. R. A. 404; 92 Am. St. Rep. 183).

The deposit of money by a railway company with a judge, as required by statute, during the progress of the proceedings to obtain a right of way, does not, unless it is withdrawn by the property owner, discharge the obligation of the company to make just compensation for the property taken or demanded; and one whose property has been taken is not bound to resort to such fund, but may, after the proceedings have terminated, recover the amount awarded to him by an action at law against the company. Nor can the company, after having prosecuted the proceedings to final determination, escape this liability by abandoning the proceedings. *Brown v. Chicago, R. I. & P. R. Co.*, 64 Neb. 62 (89 N. W. Rep. 405). The court say: "The constitution of this state provides (section 12, art. 1): 'The property of no person shall be taken or damaged for public use without just compensation therefor.' The language of this section is imperative, and the right of the property owners to compensation is unqualified. This right can not be impaired or modified by legislation or otherwise. He is not compensated until the sum to which he is entitled is paid or tendered to him or to some one authorized by him to receive it. It is not competent for either the legislature or the courts to appoint some person without his consent, and to say that placing of deposit with such appointee shall be equivalent to payment to him. If the statute expressly so provides, or was susceptible of that construction, it would be unconstitutional and void. In our opinion such is not its meaning, although it goes to the furthest limit permissible. The money, after the assessment has been made, is deposited with the county judge, not as payment, but as security that payment shall be made; and no act of the railway company, or of the court, or of any other person other than the property owner, can convert it into a payment, or relieve the corporation of its obligation, not to secure, but actually to make, just compensation for the property taken or damaged.

The property owner may, if he chooses, waive his privilege, and apply for and receive the sum awarded and deposited, and by so doing he, of course, relieves both the company and the judge of all further or other responsibility; but he may also, if he prefers, stand upon his constitutional right, and demand that the sum awarded be paid to him, or to an agent of his own choosing. Neither during the pendency of the proceedings nor after they have ended can he be compelled to resort for the satisfaction of his demands to the uncertain security of official responsibility, nor to incur the risk of official delinquency. He can not be charged with the negligence or shortcomings of an agent in whose appointment he did not concur, nor can he be accused of negligence because of failure to demand of a third person a sum of money which his adversary is under obligation to pay himself. The proceeding is instituted at the instance and for the benefit of the railway company, and the deposit is permitted to be made solely for its convenience. Having made it, the company obtains a license to enter upon the land, but does not accomplish the taking of the property, or acquire an easement therein, until it has satisfied the constitutional requirement, and made compensation therefor to the person owning the same. Commenting upon similar constitutional and statutory enactments, the supreme court of Iowa, in *White v. Railway Co.*, 64 Ia. 281 (20 N. W. Rep. 436), say: 'These provisions are in harmony with the constitution. The payment of the money to the sheriff can not be regarded as a payment to the landowner. Section 1244 provides that the amount of damages shall be paid to the sheriff "for the use" of the owner of the land. This evidently means nothing more than that it shall be paid by the sheriff, at the proper time, to the owner. The sheriff can not be regarded as the agent of the owner, but rather as the agent of the railway company, which invoked his services by instituting the proceedings. The money can not be regarded as having been paid into court, and therefore in the custody of the law. But, if this be not so, the payment to the sheriff is not payment to the landowner. If through the unfaithfulness or mistake of the sheriff, or the failure to pursue the directions of the statute, the money should be lost, and not reach the hands of the landowner, the loss ought not to fall upon him, but rather upon the railway company, which was the mover in the proceedings, and received the benefits flowing from them. *Blackshire v. Railroad Co.*, 13 Kan. 514.'

Sec. 195. Compensation for property taken as a prerequisite to the taking—Giving bond for pending condemnation proceedings. A statute (Utah Rev. Stat., § 3597) authorizing the court to allow one who has commenced proceedings to appropriate lands to a public use to enter thereupon and do certain work pending such proceedings, upon the giving of bond to pay "the adjudged value of the premises and all damages in case the property is condemned, and to pay all damages arising from occupation before judgment in case the premises are not condemned, and all costs adjudged to the defendant in the action," is not in violation of Utah Const., art. 1, § 22, providing that "private property shall not be taken or damaged for public use without just compensation." *Salt Lake City Water & Elec. Power Co., v. City of Salt Lake City*, 24 Utah 282 (67 Pac. Rep. 791). The court say: "We are aware that the decisions of the several states respecting the question above determined are not all harmonious and are irreconcilable; but the decided weight of authority, where the constitutional provisions on this subject are similar to ours, doubtless sustains the conclusion reached herein. In section 456, 2 Lewis, Em. Dom., it is said: 'In most states it is held that the making of compensation need not precede an entry upon the property, provided some definite provision is made whereby the owner will certainly obtain compensation.' The supreme court of Massachusetts, in *Old Colony R. Co. v. Framingham Water Co.*, 153 Mass. 561 (27 N. E. Rep. 662; 13 L. R. A. 332), held that a statute empowering a town water company to take land, and providing that the damages therefor might be assessed as in the case of the laying out of highways, and that the company might be required to give security for such damages, 'satisfactory to the selectmen of said town,' failing which its rights should be suspended except for making surveys, made adequate provision for compensation for the land taken. In *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641 (10 Sup. Ct. Rep. 965; 34 L. Ed. 295), Mr. Justice Harlan, delivering the opinion of the court, said: 'It is further suggested that the act of congress violates the constitution, in that it does not provide for compensation to be made to the plaintiff before the defendant entered upon these lands for the purpose of constructing its road over them. This objection to the act can not be sustained. The constitution declares that private property shall not be taken "for public use without just compensation." It does not provide or require that compensation

shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed.' And again he observed: 'The plaintiff asks, what will be its condition, as to compensation, if, upon the trial de novo of the question of damages, the amount assessed in its favor should exceed the sum which may be paid into court by the defendant? This question would be more embarrassing than it is, if by the terms of the act of congress the title to the property appropriated passed from the owner to the defendant, when the latter, having made the required deposit in court, is authorized to enter upon the land pending the appeal, and to proceed in the construction of its road. But, clearly, the title does not pass until compensation is actually made to the owner. Within the meaning of the constitution, the property, although entered upon pending the appeal, is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner.' 2 Lewis, Em. Dom. §§ 457-462; Mills, Em. Dom. § 124; *Nichols v. Railroad Co.*, 43 Me. 356; *Railroad Co. v. Turner*, 31 Ark. 494 (25 Am. Rep. 564); *In re United States Com'rs*, 96 N. Y. 227; *Cushman v. Smith*, 34 Me. 247; *Rider v. Stryker*, 63 N. Y. 136; *Doe v. Railroad Co.*, 1 Ga. 524; *Wellington & P. R. Co. v. Cashie & C. R. & Lumber Co.*, 116 N. C. 924 (20 S. E. Rep. 964); *Walther v. Warner*, 25 Mo. 277; *Railway Co. v. Payne*, 4 U. S. App. 77 (1 C. C. A. 183; 49 Fed. Rep. 114); *Kennedy v. City of Indianapolis*, 103 U. S. 599 (26 L. Ed. 550); *Sweet v. Rechel*, 159 U. S. 380 (16 Sup. Ct. Rep. 43; 40 L. Ed. 188); *Backus v. Depot Co.* 169 U. S. 557 (18 Sup. Ct. Rep. 445; 42 L. Ed. 853)."

Sec. 196. Proceedings to condemn land—Necessity of notice. A statute (Shannon's Tenn. Code § 1984) giving a right of appeal in condemnation proceedings to the party aggrieved, necessarily implies the giving of notice of the pendency of the proceedings. *Woolard v. Mayor, etc., of City of Nashville*, 108 Tenn. 353 (67 S. W. Rep. 801). In discussing the necessity of notice in such cases, the court say: "All the authorities agree that the right of eminent domain can only be constitutionally exercised when the property owner is given notice of the effort to condemn his property, and just compensation is provided for the owner upon its condemnation. Due process of law requires that notice be reasonable in time,

so that the owner may have a reasonable opportunity to appear before an impartial tribunal before any binding decree or judgment affecting his case be entered. *Stuart v. Palmer*, 74 N. Y. 183 (30 Am. Rep. 289); *Davidson v. New Orleans*, 96 U. S. 97 (24 L. Ed. 616); *Lewis, Em. Dom.* § 365. Some authorities hold that though a statute is defective, in failing to provide for notice, yet the defect is remedied where the property owner, having actual notice, appears before the jury of inquest in the course of its proceedings. *Mann v. Mayor, etc.*, 24 N. J. L. 662; *Whiteford v. Probate Judge*, 53 Mich. 130 (18 N. W. Rep. 593); *Kramer v. Railroad Co.*, 5 O. St. 140. While others proceed upon the principle that 'where a statute authorizes a legal proceeding against any one, and does not expressly provide for notice to be given, it is implied that an opportunity shall be afforded him to appear in defense of his rights, unless the contrary clearly appears.' *Baltimore & O. R. Co. v. Pittsburg, W. & K. Ry. Co.*, 17 W. Va. 812. But says Mr. Lewis in section 368 of his work, already referred to: 'By far the greater proportion of the cases, however, proceed upon the principle of implying a requirement to give notice from the provisions of the statute itself. Thus the obligation to give notice has been held to be implied by a provision in the statute requiring a previous effort to agree, or giving the right of appeal, or authorizing the owner to strike off jurors, or show cause against the confirmation of the inquisition.' In support of his text the author cites *Tracey v. Railroad Co.*, 80 Ky. 259; *In re Williams*, 59 Me. 517; *In re Hinckley*, 15 Pick. (Mass.) 447; *City of Boonville v. Ormrod's Adm'r*, 26 Mo. 193; *Dicky v. Tennison*, 27 Mo. 373; *Swan v. Williams*, 2 Mich. 427."

Unless prohibited by some constitutional or statutory provision, proceedings may be had under a statute (Kan. Gen. Stat. 1901, § 6131) whereby title to land is acquired under the right of eminent domain without previous notice or compensation to the owner, such appropriation being for a public purpose, and means being provided the owner for the determination of the value of the property so taken by due process of law. *Buckwalter v. School Dist. No. 42*, 65 Kan. 603 (70 Pac. Rep. 605). The court say: "No notice is required by this section to be given to the owner of the land. No constitutional provision requires it. There is no constitutional or statutory requirement that payment shall be made as a prerequisite to the taking, or even made at all. But unquestion-

ably there is that principle underlying all constitutions and laws, and which must be read into all of them, that private property may not be taken for public purposes without adequate compensation. This is indicated in the bill of rights. Notice to the citizen of the taking of his property for a public purpose is of no concern to him, for the right to take exists independently of notice. It is only when compensation for such taking comes to be considered that the owner of the condemned property becomes interested, and only of proceedings to determine that question is he entitled to notice, for upon that question only has he a right to be heard. The taking precedes the assessment of damages. The title passes upon the taking of the property. The constitution of many states provide, in substance, that the property of the citizen can only be taken after compensation has been made. In such states, of course, the making of compensation must precede the taking; hence some proceeding to determine value, to which the owner has been a party, must precede the taking of the property or the passing of title. But it may be urged no provision was made by the law for the giving of notice of these condemnation proceedings, even to determine the value of the land taken, and therefore its assessment was void. This might be granted, and yet the proceeding would vest title in the school district, for the condition on which the title was to so vest was 'upon payment being made to the county treasurer by such district board.' Very true, the owner was not bound by the amount of the assessment. She might, if she did not choose to accept the price fixed by the appraisers and paid by the school district to the county treasurer, have appealed from that award, and had her day in court upon such appeal, unless cut off by the lapse of time, or she might have resorted to an independent action against the school district to try the question of the value of the property which it had appropriated.

These views are fully sustained by the following cases taken from states having constitutional provisions similar to our own: *Commissioners' Court v. Bowie*, 34 Ala. 461; *Railroad Co. v. Turner*, 31 Ark. 494 (25 Am. Rep. 564); *Fox v. Railroad Co.*, 31 Cal. 538; *Powers v. Armstrong*, 19 Ga. 427; *Railroad Co. v. Daugherty*, 40 Ind. 33; *Cushman v. Smith*, 34 Me. 247; *Riche v. Water Co.*, 75 Me. 91; *Haverhill Bridge Proprietors v. Essex Co. Com'rs*, 103 Mass. 120 (4 Am. Rep. 518); *People v. Michigan Southern R. Co.*, 3 Mich. 496; *Orr v. Quimby*, 54 N. H. 590; *Den v. Banking Co.*, 24 N. J. L.

587; *Bates v. Cooper*, 5 Ohio, 115; *Mayor v. Scott*, 1 Pa. 309; *Com. v. Pittsburg & C. R. Co.*, 58 Pa. 26; *Hatarmehl v. Dickinson*, 8 Phila. 282. As illustrative of the cases, and in support of the views herein announced, the following quotation is made from *People v. Adirondack Ry. Co.*, 160 N. Y. 225, 238, 239 (54 N. E. Rep. 689, 693): 'The state needs the property, and takes it; and, while the citizen can not resist, he has the right to insist upon just compensation, to be ascertained by an impartial tribunal. It is a compulsory purchase by public authority, and the individual receives money in the place of the property taken. He has a right to his day in court on the question of compensation, but he has no right to a day in court on the question of appropriation by the state, unless some statute requires it. In *re Village of Middletown*, 82 N. Y. 196, 201. There is no necessity for any safeguard against taking, because the right to take is all there is of the power of eminent domain, and is necessarily conceded to exist when the existence of the power is admitted. Safeguards become necessary only when the question of compensation is reached, and then the courts are careful to see that the owner receives all that he is entitled to. Until then the courts could not help him, unless some statutory right were invaded, as the method of taking is within the exclusive control of the legislature. If a statute requires judgment of condemnation, judgment must be had accordingly before the property can be taken; but otherwise a certificate of condemnation by an executive officer, followed by payment, satisfies every requirement of the constitution. If the use is not public, the statute authorizing condemnation is void, but this question of law need not be settled in the proceeding to take, as it can be raised by the property owner in a variety of ways.'

Sec. 197. Proceedings to condemn land—Evidence. A map or plat showing a possible but largely imaginary plan for the development of the land sought to be conveyed, is not admissible in evidence. *Sexton v. Union Stock Yard & T. Co.*, 200 Ill. 244 (65 N. E. Rep. 638). Declarations of the owner of land as to its value, his offer of it at a fixed price, and sale of a portion of it, are evidence on the question of damages, as constituting his estimate of the value. *Houston v. Western Washington R. Co.*, 204 Pa. St. 321 (54 Atl. Rep. 166). The price paid by the owner for property sought to be condemned is not admissible in evidence where the property

was purchased seven years before the commencement of the condemnation proceedings and for a lump sum in connection with other property and from an insolvent debtor of the owner in part payment of his debt. *Lanquist v. City of Chicago*, 200 Ill. 69 (65 N. E. Rep. 681). The price brought on a sale of vacant land is evidence of the value of neighboring land, though it has a building upon it; and the fact that the sale was made to a water board having power to purchase as well as to condemn land does not render it inadmissible on the theory that it was not a fair transaction in the market, but rather a compulsory settlement. *O'Malley v. Commonwealth*, 182 Mass. 196 (65 N. E. Rep. 30). Evidence of actual sales of property similarly situated is admissible on the question of the value of the land taken. *Loloff v. Sterling*, Colo. (71 Pac. Rep. 1113). To qualify a witness to testify as to the value of land taken, he must appear to be familiar with the property in question, its area, and the uses to which it may reasonably be applied, and the extent and condition of its improvements. *Friday v. Pennsylvania R. Co.*, 204 Pa. St. 405 (54 Atl. Rep. 339). Persons acquainted with the value of the land for a particular use, though not acquainted with its value for farming purposes, the chief use to which lands of like character were put, may testify as to its value for the particular use, where there is sufficient evidence for submission to the jury of the question of the availability of the land for the particular use. *Gearhart v. Clear Spring Water Co.*, 202 Pa. St. 292 (51 Atl. Rep. 891).

Sec. 198. Proceedings to condemn land—Instructions to jury. An instruction which correctly charges a jury as to every element of damage is not rendered erroneous by reason of its telling them the nature of the estate which will be acquired by the condemning party. *Sexton v. Union Stock Yard & T. Co.*, 200 Ill. 244 (65 N. E. Rep. 638). It is not error to instruct the jury that in estimating damage they "are permitted to exercise, in weighing the evidence, their individual judgment as to values upon subjects within their knowledge which they have acquired through experience and observation." *Beveridge v. Lewis*, 137 Cal. 619 (67 Pac. Rep. 1040; 59 L. R. A. 581). An instruction which permits the jury to determine the damages to be awarded from their own knowledge and experience, founded, it may be, upon facts outside of the evidence presented to them in the case, is erroneous.

De Gray v. New York & N. J. Tel. Co., 68 N. J. L. 454 (53 Atl. Rep. 200). Citing, *Burrows v. Transportation Co.*, 106 Mich. 582 (64 N. W. Rep. 501; 29 L. R. A. 468); *Douglass v. Trask*, 77 Me. 35; *Gibson v. Carreker*, 91 Ga. 617 (17 S. E. Rep. 965); *Brakken v. Railway Co.*, 29 Minn. 41, 43 (11 N. W. Rep. 124). But in Illinois it is held that an instruction to a jury that "if they believe from the whole evidence that they have, from personal examination of the premises, arrived at a more accurate judgment and determination as to the value of the premises sought to be taken, and of the amount of damages, if any, than is shown by the evidence in open court, then and in that case they may, upon the evidence, rightfully fix the value of the land taken and the amount of damage, if any, over and above special benefits, if any, at the amount so approved by their judgment, so formed from personal examination of the premises as a jury, even though it may differ from the amount testified to, and from the weight of testimony given by witnesses in open court", is not objectionable. *Guyer v. Davenport, R. I. & N. W. Ry. Co.*, 196 Ill. 370 (63 N. E. Rep. 732). And in Iowa the same is held as to an instruction to the jury that "You have the right to use your own knowledge of the values of lands, the operating of railroads, and of affairs generally, in connection with the testimony as to the values and damages which has been given by the witnesses. By this is meant that you are not obliged to rely wholly upon the opinions of the witnesses as to the value of this land or as to the damages, but that, in connection with such opinions, you may use and be guided by your own judgment on such matters." *Hoyt v. Chicago, M. & St. P. Ry. Co.*, 117 Ia. 296 (90 N. W. Rep. 724). Citing *Head v. Hargrave*, 105 U. S. 45 (26 L. Ed. 1028); *Green v. City of Chicago*, 97 Ill. 370; *Railroad Co. v. Drake*, 46 Kan. 568 (26 Pac. Rep. 1039); *Bentley v. Brown*, 37 Kan. 14 (14 Pac. Rep. 434); *Patterson v. City of Boston*, 20 Pick. 166; *Stevens v. City of Minneapolis*, 42 Minn. 136 (43 N. W. Rep. 842); *Johnson v. Railroad Co.*, 37 Minn. 519 (35 N. W. Rep. 438). For particular cases determining the applicability of instructions, see *Reiber v. Butler & P. R. Co.*, 201 Pa. St. 49 (50 Atl. Rep. 311); *Du Pont v. Sanitary Dist. of Chicago*, 203 Ill. 170 (67 N. E. Rep. 815); *Westbrook v. Muscatine N. & S. R. Co.*, 115 Ia. 106 (88 N. W. Rep. 202); *Northern Pac. Ry. v. Duncan*, 87 Minn. 91 (91 N. W. Rep. 271); *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244 (70 Pac. Rep. 498; 94 Am. St. Rep. 864).

Sec. 199. Proceedings to condemn land—Jury trial—View of premises. The award of a jury made after an inspection of the premises by them will not be set aside if it is within the range of the testimony, unless it appears that injustice has been done, and that passion or prejudice influenced the action of the jury. *Sexton v. Union Stock Yard & T. Co.*, 200 Ill. 244 (65 N. E. Rep. 638). To the same effect is the case of *Lanquist v. City of Chicago*, 200 Ill. 69 (65 N. E. Rep. 681); *East & W. I. Ry. Co. v. Miller*, 201 Ill. 413 (66 N. E. Rep. 275). An assessment of damages made by a jury composed of citizens having peculiar knowledge of the subject will not be disturbed on appeal save in a perfectly plain case. *Texas & P. Ry. Co. v. Wilson*, 108 La. 1 (32 So. Rep. 173). Ohio Rev. Stat., § 3574-1 (Laws, Vol. 90, p. 153), enabling cemetery associations to acquire land by appropriation, for entrances, or the improvement of entrances, to their grounds, is held unconstitutional, because it fails to provide for the right and means of appeal by the landowner to some competent tribunal, where he can have his compensation assessed by a jury. *King v. Greenwood Cemetery Ass'n*, 67 O. St. 240 (65 N. E. Rep. 882).

Sec. 200. Proceedings to condemn land—Recovery of interest, costs and attorney's fees. In Iowa, where land is condemned and taken possession of before the damages are paid, interest should be allowed on the amount of the award. *Lough v. Minneapolis & St. L. R. Co.*, 116 Ia. 31 (89 N. W. Rep. 77). Sums paid by the petitioner for the services of stenographers at the hearing and in making reports of evidence can not be allowed as costs, where they were paid under an agreement between the counsel for the hiring of a stenographer and the payment of his services by both parties in equal shares. *Boston Belting Co. v. City of Boston*, 183 Mass. 254 (67 N. E. Rep. 428). Applying Ia. Code, § 2007, it is held that where a corporation which has instituted condemnation proceedings dismisses the same pending an appeal by the property owner from the award made by the commissioners, it is liable for his attorney's fees. *Mellichar v. City of Iowa City*, 116 Ia. 390 (90 N. W. Rep. 86). A city authorized by its charter (*St. Louis City Charter*, art. 6, § 9) to dismiss condemnation proceedings at any time before the report of commissioners is finally confirmed, upon payment of the costs thereof, is not liable to a landowner for attorney's fees upon

dismissal of proceedings by it to condemn his land for a street, it not appearing that they were unreasonably and vexatiously protracted or delayed. *St. Louis Brewing Ass'n v. City of St. Louis*, 168 Mo. 37 (67 S. W. Rep. 563). *St. Louis City Charter*, art. 6, § 9 construed and applied—dismissal by city of condemnation proceedings—liability for costs and attorney's fees. *St. Louis Brewing Ass'n v. City of St. Louis*, 168 Mo. 37 (67 S. W. Rep. 563); *Lester Real Estate Co. v. City of St. Louis*, 169 Mo. 227 (70 S. W. Rep. 151).

Sec. 201. Proceedings to condemn land—Rights of remainderman, vendee, mortgagee or devisee. A remainderman has no interest in damages received by a life tenant upon condemnation of the land, where they represent compensation only for the damage to the life estate. *Trimmier v. Darden*, 61 S. C. 220 (39 S. E. Rep. 373). One holding real property under contract of purchase with the owner, and who has paid a substantial portion of the purchase price, has such an interest therein as will entitle him to compensation before the property can be taken or damaged for a public use. His right to compensation is not affected by the fact that his interest is less than the whole, so long as it is substantial, and the taking of the property affects that interest. *Olson v. City of Seattle*, 30 Wash. 687 (71 Pac. Rep. 201). One taking a mortgage of land pending proceedings to appropriate it for public use is entitled to the damages awarded as against a creditor of the owner attaching the fund. *Brooks v. Hubbard*, 73 Vt. 122 (50 Atl. Rep. 802). A devisee of land under a will can not claim the proceeds thereof arising from an appropriation of the land for public use consummated during the testator's lifetime. *Ametrano v. Downs*, 170 N. Y. 388 (63 N. E. Rep. 340; 58 L. R. A. 719; 88 Am. St. Rep. 671).

Sec. 202. Proceedings to condemn land—Miscellaneous notes. Condemnation proceedings are statutory and statutes authorizing them must be strictly construed and substantially complied with. *Florida Cent. & P. R. Co. v. Bear*, 43 Fla. 319 (31 So. Rep. 287). Proceedings to condemn private property for public use are purely statutory proceedings in rem, and unless it affirmatively appear upon the face of the proceedings that every essential prerequisite of the statute conferring the authority has been complied with, such proceedings will be void. *City of St. Louis v. Koch*, 169 Mo. 587

(70 S. W. Rep. 143). An appraiser who had formerly taken part in appraising the value of the premises as a member of a real estate board is disqualified from acting as appraiser in proceedings by a city to condemn the property for park purposes. *In re Board of Park Com'rs*, Minn. (91 N. W. Rep. 1111). The charter of a corporation seeking to appropriate land, which appears on its face to be regularly organized, can not be collaterally attacked in the condemnation proceedings; nor can they be defeated by showing that it has not made the requisite compliance with municipal or governmental regulations essential to its enjoying the property when condemned. *Union Pac. R. Co. v. Colorado Postal Tel. Cable Co.*, 30 Colo. 133 (69 Pac. Rep. 564); *Denver Power & Irr. Co. v. Denver & R. G. R. Co.*, 30 Colo. 204 (69 Pac. Rep. 568; 60 L. R. A. 383). The fact that a traction railway company has not first obtained the consent of a municipality to the construction of its railway over and upon the streets of a village within the line of its survey, which is a condition precedent to the construction of its railway in the streets, is no bar to its condemnation of lands to secure its right of way through private property. *Houston v. Patterson State Line Traction Co.* N. J. L. (54 Atl. Rep. 403). In Tennessee the location of a line of railroad duly authorized by the board of directors of the company is not a prerequisite to its condemnation of land. *Tennessee Cent. R. Co. v. Campbell*, 109 Tenn. 655 (73 S. W. Rep. 112). A complaint by a city for a condemnation for a water supply of water rights in a stream should contain a description of the lands, their location, the point of diversion of the water, and the number and size of the ditches upon the said lands or appurtenant thereto. *City of Helena v. Rogan*, 26 Mont. 452 (68 Pac. Rep. 798).

Sec. 203. Proceedings to condemn land—Statutes construed. Construing and applying Ala. Const., art. 14, § 17; Code, §§ 1719-1721, it is held that in that state the landowner is protected in his possession so long as he has not had or waived the right to have his compensation assessed by a jury of twelve men; and the bond on appeal from the probate court does not entitle the applicant to enter; but this right is postponed until there is an assessment by a jury. *Southern Ry. Co. v. Birmingham, S. & N. O. Ry. Co.*, 130 Ala. 660 (31 So. Rep. 509). A provision in a city charter (Conn. Laws 1881, p. 234, § 4) authorizing it to condemn property for the

purposes of sewerage, does not authorize the infliction of a temporary nuisance upon property through a discharge of sewage by the city until it can provide a means for an abatement of the nuisance, upon an assessment of damages for a term of years on the city's allegation to discontinue the use within such time. *City of Waterbury v. Platt*, 75 Conn. 387 (53 Atl. Rep. 958; 60 L. R. A. 211; 96 Am. St. Rep. 229). Ga. Civ. Code, § 2167 construed and applied—Right of railway company to condemn crossing over track of another company. *Atlantic & B. R. Co. v. Seaboard Air Line Ry.*, 116 Ga. 412 (42 S. E. Rep. 761). The court may refuse to appoint appraisers on the application of a natural gas company to appropriate real estate for its pipe line, under Burns' Ind. Rev. Stat., §§ 5103-5105, where it does not appear on the face of the proceedings that the petitioner has the right to maintain them. The petition must show that the petitioner is engaged in furnishing gas to the public; and it is defective if it asks for the appropriation of the fee, as the statute authorizes only the taking of an easement. *Great Western Nat. Gas & Oil Co. v. Hawkins*, 30 Ind. App. 557 (66 N. E. Rep. 765). An appeal can not be taken to the appellate court in proceedings by a railroad company to appropriate a right of way across the tracks of another railroad company, under Burns' Ind. Rev. Stat., §§ 5158a-5160, until the circuit court has reviewed and finally disposed of the award filed in it, to which exceptions have been filed. *Wabash R. Co. v. Cincinnati, R. & M. R. R.*, 29 Ind. App. 546 (63 N. E. Rep. 325). The location and survey of a route for a railroad does not constitute the commencement of condemnation proceedings, under Ia. Code, § 1995, so as to give any priority of right. *Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. Ry. Co.*, 116 Ia. 681 (88 N. W. Rep. 1082). Construing and applying Ia. Code, §§ 1999, 2009, it is held that proceedings to condemn land by a railroad, after appeal from the assessment to the district court, are in the form of "a suit of a civil nature at law," within the statutes of the United States authorizing removal of causes to the federal court. *Myers v. Chicago & N. W. Ry. Co.*, 118 Ia. 312 (91 N. W. Rep. 1076). Ia. Code, §§ 2015, 2016, construed and applied—condemnation of abandoned railroad right of way. *Remey v. Iowa Cent. Ry. Co.*, 116 Ia. 133 (89 N. W. Rep. 218). Construing and applying Kan. Gen. Stat., ch. 23, §§ 118, 119, it is held that the fact that a railroad company has conducted land-condemnation

proceedings to completion, and has deposited the condemnation money with the county treasurer, does not preclude it from reclaiming the deposit, if it has abstained from making an actual entry on the land for the purpose of constructing its road, and has abandoned its intention to use the land for such purpose, and has given notification of such abandonment. *Atchison, T. & S. F. R. Co. v. Wilson*, 66 Kan. 233 (69 Pac. Rep. 342). Condemnation proceedings by a school district for the purpose of acquiring title to a school house site, under Kan. Gen. Stat. 1901, § 6131, divests the owner of title thereto, even though he at the time had only an equitable title, and thereafter received the legal title. *Buckwalter v. School Dist. No. 42*, 65 Kan. 603 (70 Pac. Rep. 605). Kan. Laws 1901, ch. 286, § 14, defining the jurisdiction and powers of the board of railroad commissioners, where one railroad company desires to cross or unite its track with that of another company upon its grounds, does not apply to a case involving the impinging of the right of way of one railway upon the grounds of another in such a manner as not to involve the intersection or union of tracks, or to the taking of the grounds of one railway for the right of way of another to the entire exclusion of the established road for the territory taken. *Atchison, T. & S. F. R. Co. v. Kansas City, M. & O. Ry. Co.*, 67 Kan. 569 (70 Pac. Rep. 939). Citing, *Appeal of Pittsburg Junction R. Co.*, 122 Pa. St. 511 (6 Atl. Rep. 564; 9 Am. St. Rep. 128); *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 668 (4 Sup. Ct. Rep. 185; 28 L. Ed. 291); *St. Louis, A. & T. H. R. Co. v. City of Belleville*, 122 Ill. 376 (12 N. E. Rep. 680). Mass. Stat. 1898, ch. 452 construed and applied—limiting height of buildings on Copely Square—recovery of damages—evidence and instructions. *Cole v. City of Boston*, 181 Mass. 374 (63 N. E. Rep. 1061). Mo. Rev. Stat. 1899, ch. 131; § 8756, conferring the right of eminent domain for the construction and maintenance of mills and mill dams, does not confer the right to condemn land for a dam, on a corporation organized for the purpose of owning and operating gas, electric, and water works, to furnish light, power, and water for hire. *Southwest Missouri Light Co. v. Scheurich*, 174 Mo. 235 (73 S. W. Rep. 496). Mont. Pol. Code, § 4800, as amended by Laws 1897, p. 203, construed and applied—condemnation by cities for water plants. *City of Helena v. Rogan*, 26 Mont. 452 (68 Pac. Rep. 798); *City of Helena v. Rogan*, 27 Mont. 135 (69 Pac. Rep. 709). The

remedy provided by S. C. Rev. Stat., §§ 1743-1755, for obtaining compensation for right of way is exclusive, except where the right to compensation is disputed, and where the owner has neither consented to nor permitted, actually nor presumptively, the entry by the corporation for construction. *Glover v. Remley*, 62 S. C. 52 (39 S. E. Rep. 780). Wis. Laws 1901, ch. 319, authorizing condemnation proceedings for the construction of telephone lines, does not entitle a telephone company to enjoin the abatement as a nuisance of a telephone pole which has been adjudged such before the passage of the statute. *Wisconsin Tel. Co. v. Krueger*, 115 Wis. 150 (90 N. W. Rep. 458). For an exhaustive discussion of the construction of Wis. Rev. Stat. 1898, §§ 1850, 1851, concerning the deposit of award in condemnation proceedings, payment and satisfaction of judgment, see *Stolze v. Milwaukee & L. W. R. Co.*, 113 Wis. 44 (88 N. W. Rep. 919; 90 Am. St. Rep. 833).

Sec. 204. Proceedings to condemn land—Conveyance of land pending proceedings to condemn it. Where the condemning party acquires a conveyance of the lands sought from the owner before an award is made he takes title by purchase. *Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co.*, 116 Ia. 681 (88 N. W. Rep. 1082). In Virginia it is held that in case of sale of land pending the hearing of exceptions to the commissioners' allowance of compensation in condemnation proceedings by a railroad, the owner of the land at the time of the confirmation of the report is entitled to the compensation. *Virginia-Carolina Ry. Co. v. Booker*, 99 Va: 633 (39 S. E. Rep. 591). A conveyance of land after application made to condemn the same by a traction railway company and notice given to the owner, under N. J. Laws 1893, p. 302; Gen. Stat., p. 3235, will not defeat the proceedings nor require notice thereof to be given to the grantee. *Houston v. Paterson State Line Traction Co.*, N. J. L. (54 Atl. Rep. 403). The court say: "It has been held that, where notice of condemnation proceedings has been given to the owner of land, his grantee pendente lite is not entitled to notice of such proceedings, nor of subsequent proceedings. *Plumer v. Wausau Boom Co.*, 49 Wis. 449 (5 N. W. Rep. 232). Also that parties acquiring rights in lands pending proceedings for their condemnation for railroad purposes will be deemed to have notice

thereof, and will take subject to the award. *Trogen v. Winona & S. P. R. Co.*, 22 Minn. 198."

Sec. 205. Measure of damages—Elements considered.

A city which, through its health officers, appropriates property for use as a pest house is liable for the value of the use thereof for that purpose. *Brown v. Pierce County*, 28 Wash. 345 (68 Pac. Rep. 872). The probable returns from an investment in land, because of the use which may be made of it, may be considered. *Gearhart v. Clear Spring Water Co.*, 202 Pa. St. 292 (51 Atl. Rep. 891). Where property has an ascertainable market value, its sentimental value as an old homestead is not a proper element of damages when it is sought to be appropriated for a railroad depot. *Cane Belt Ry. Co. v. Hughes*, 31 Tex. Civ. App. 565 (72 S. W. Rep. 1020). The measure of damages for injury to property caused by a city's interference with the flow of a stream by its improvement thereof, under Mass. Stat. 1874, p. 126, ch. 196, is the diminution in value of the property by reason of the loss of the water, to be determined in reference to the uses to which the property was adapted, including the use to which it was then being put; but it is not to be determined in reference to conditions which pertain solely to its owner. Loss to the business which was then carried on there could not be considered as in itself an element of damages. *Boston Belting Co. v. City of Boston*, 183 Mass. 254 (67 N. E. Rep. 428).

Sec. 206. Measure of damages—Loss of business as an element of damage. As a general rule, damages to the business of a landowner are too remote; but where the taking of a portion of his land renders the moving of freight to and from the remainder, on which he is conducting a foundry, more difficult and expensive, the effect of this on his business may be considered. *Richmond, P. & C. R. Co. v. Chamblin*, 100 Va. 401 (41 S. E. Rep. 750). In the absence of a special statutory provision, the loss of business resulting from the taking of property is not a proper element of damages. *Bailey v. Boston & P. R. Corp.*, 182 Mass. 537 (66 N. E. Rep. 203). The court say: "Loss to business, as business, is too remote and consequential a damage to be allowed in estimating damage to the real estate on which it is conducted. Nor does it furnish a correct criterion by which to determine the diminution in value of the estate for the uses to which it is adapted. The business

might chance to be exceedingly profitable at the time of the taking, so that an interruption of it from an interference with the full use of the real estate might cause a loss far greater than the reasonable rentable price of the property, or it might then be going on at a loss, so that the interruption would cause no damage to the business, notwithstanding that the interference with the use of the real estate was such as would cause a great diminution of its rentable value." A statute (Mass. Stat. 1895, ch. 488), authorizing the awarding of damages resulting from the exercise of the right of eminent domain to an "individual * * * owning * * * an established business on land in the town," is constitutional, and is held to apply to a doctor having an office in, and a practice extending throughout, a town in which the land is taken. *Earle v. Commonwealth*, 180 Mass. 579 (63 N. E. Rep. 10; 57 L. R. A. 292; 91 Am. St. Rep. 326). See opinion as to what may be considered in estimating the damages in such a case. But it is held that a widow who keeps a home for herself and children, they paying board, and occasionally boards relatives during their vacation, does not come within the terms of this statute. *Gavin v. Commonwealth*, 182 Mass. 190 (65 N. E. Rep. 37).

Sec. 207. Measure of damages—Condemnation of land for railroad right of way. Damages for the appropriation of land by a railroad company are to be awarded as of the date of its entry. *Van Husan v. Omaha Bridge & T. Ry. Co.*, 118 Ia. 366 (92 N. W. Rep. 47). The measure of damages for the taking of a private way appurtenant to lands is the depreciation in their market value occasioned thereby. *Neff v. Pennsylvania R. Co.*, 202 Pa. St. 371 (51 Atl. Rep. 1038). Where land taken contains mineral, the measure of compensation is the sum that would be given for the land with the mineral in it; but any inquiry as to the profits or the price or the value of the minerals if the minerals themselves have been taken out will not be permitted. *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244 (70 Pac. Rep. 498; 94 Am. St. Rep. 864). Citing, *Sanitary Dist. v. Loughran*, 160 Ill. 362 (43 N. E. Rep. 359); *Searle v. Railroad Co.*, 33 Pa. 57; *Port v. Railroad Co.*, 168 Pa. 19 (31 Atl. Rep. 950). Where a railroad company appropriates a strip of land previously taken by another company, and on which it has located and partially constructed a road, the measure of compensation is the value of the strip, the whole of it being taken, to its then owners in the condition it is at the time of the

appropriation by the second company. *Northern R. Co. v. Earhart*, 167 Mo. 612 (67 S. W. Rep. 229). Cal. Const., art. I, § 14, is constitutional, and the negative proposition therein that "no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation," does not authorize an allowance for benefits where an appropriation of a railroad right of way is sought to be made by an individual. *Beveridge v. Lewis*, 137 Cal. 619 (70 Pac. Rep. 1083; 59 L. R. A. 581; 92 Am. St. Rep. 188). See 67 Pac. Rep. 1040. In determining the measure of damages for the appropriation of a railroad right of way across a farm, it is proper to consider the statutory (Ia. Code, § 2022) duty of the company to construct an adequate crossing over or under its road. The proper measure of damages is the difference in the fair market value of the land, exclusive of any benefits it might derive from the construction of the road. *Lough v. Minneapolis & St. L. R. Co.*, 116 Ia. 31 (89 N. W. Rep. 77). It is held to be well settled in Missouri that the measure of damages for the taking of private lands by a railroad corporation for a right of way is the value of the land taken, and the damage, if any, to the tract of which it forms a part, from which must be deducted the benefits, if any, peculiar to such tract arising from running the road through it. This is the rule, whether the land be taken in condemnation proceedings, or without license or other right. *McElroy v. Kansas City & I. Air Line*, 172 Ill. 546 (72 S. W. Rep. 913).

Sec. 208. Measure of damages—Appropriation of railroad right of way for other purposes. A railroad company claiming a right of way by virtue of a grant, in Act. Cong., July 4, 1884 (23 U. S. Stat., 73), takes subject to the right of the proper municipal authorities to lay out highways across the same, but it is entitled to compensation, to be determined by proper condemnation-proceedings, from the municipality laying out a highway over its right of way for change and removal of permanent structures on its right of way thereby necessitated, the construction of which were authorized by the terms of the grant; but it can not recover expenditures required to comply with police regulations. *Southern Kansas Ry. Co. v. Oklahoma City*, 12 Okla. 82 (69 Pac. Rep. 1050).

See opinion for exhaustive discussion of these subjects. In a proceeding to appropriate the property of a company owning an existing railroad, for the purpose of extending a street under its tracks, such company is entitled to compensation for the cost of a bridge or viaduct to carry its trains over the street. *Cincinnati, H. & D. Ry. Co. v. City of Troy*, 68 O. St. 510 (67 N. E. Rep. 1051). In assessing damages for the appropriation by a city of the right to extend a street over the right of way and tracks of a railroad company, it is not entitled to damages for the expenditures thereby necessitated by it in order to conform to police regulations to secure the common welfare. *Chicago & N. W. Ry. Co. v. City of Morrison*, 195 Ill. 271 (63 N. E. Rep. 96); *Southern Kansas Ry. Co. v. Oklahoma City*, 12 Okla. 82 (69 Pac. Rep. 1050). The measure of damages for the appropriation of a part of a railroad right of way for a telegraph line is the amount of decrease in value of the use of the right of way for railroad purposes which will result from the easement appropriated and used by the telegraph company. *Cleveland, C. C. & St. L. Ry. Co. v. Ohio Postal Tel. Cable Co.*, 68 O. St. 306 (67 N. E. Rep. 890; 62 L. R. A. 941).

Sec. 209. Title acquired by condemnation of land. One appropriating land under the right of eminent domain acquires easements running with it. *Deavitt v. Washington County*, 75 Vt. 156 (53 Atl. Rep. 563). Notwithstanding N. C. Code § 1946, providing that all persons parties to proceedings to condemn land for railroad purposes, "shall be divested and barred of all right, estate, and interest in such real estate during the corporate existence of the company aforesaid," it is held in that state that condemnation of land for a railroad right of way gives the railroad company only an easement, with the right to the actual possession of so much only thereof as is necessary for the operation and protection of the road; and hence a house situated on the right of way at the time of condemnation proceedings does not become the absolute property of the company. *Shields v. Norfolk & C. R. Co.*, 129 N. C. 1 (39 S. E. Rep. 582).

EQUITY.

EPITOME OF CASES.

Sec. 210. Subrogation—Rights of purchaser, mortgagor and mortgagee. Subrogation will not be enforced to protect a purchaser from his ignorance of facts of which he was charged with notice by the public records which he failed to examine. *Deavitt v. Ring*, 74 Vt. 431 (52 Atl. Rep. 1045). A vendee paying a purchase money debt of his vendor for which the holder has a vendor's lien is entitled to be subrogated to such lien. *Fulkerson v. Taylor*, 100 Va. 426 (41 S. E. Rep. 863). Where a purchaser of land at a void judicial sale or one claiming under him discharges prior tax and judgment liens on the property he is entitled to be subrogated thereto. *Junior Order Bldg. & L. Ass'n v. Sharpe*, 63 N. J. Eq. 500 (52 Atl. Rep. 832). Citing, *Riley v. Martinelli*, 97 Cal. 575 (32 Pac. Rep. 579; 21 L. R. A. 48, note; 33 Am. St. Rep. 209); 23 Am. & Eng. Enc. Law (1st Ed.) pp. 261, 266, and notes; *Freem. Void Ex'n Sales, Pars.* 51-53; *Bright v. Boyd*, 1 Story 478 (4 Fed. Cas. 127, 134; No. 1875); *Davis v. Gaines*, (1881) 104 U. S. 386 (26 L. Ed. 757); *Payne v. Hathaway*, 3 Vt. 212. One who purchases land from the heirs at law of a deceased person, and, in order to remove an incumbrance from the property, pays the debts made by such person in his life time, to secure which a deed to the land was given, is subrogated to all the rights of the creditor whose debt he has extinguished, and this equitable right passes to subsequent vendees of such purchaser, and may be asserted against claims of a subsequent administrator of the decedent. *Simpson v. Ennis*, 114 Ga. 202 (39 S. E. Rep. 853). A mortgagor of land who, without mention of the mortgage, quitclaims the premises to one who afterward conveys to another person who assumes the mortgage and after its foreclosure gives a second mortgage on the premises subject to the first mortgage, may compel the holder of the second mortgage to deliver to him an assignment of the first bond and mortgage and the judgment foreclosing it, all of

which had been assigned to such second mortgagee upon payment of the amount due, where such judgment of foreclosure contains a deficiency decree against such first mortgagor only, and the second mortgagee refuses to execute the judgment and sell the property. *Howard v. Robbins*, 170 N. Y. 498 (63 N. E. Rep. 530). A mortgagee of a leasehold estate subject to whose mortgage one has taken an assignment of a lease, upon failure of such assignee to perform the covenants of the lease to pay rent and taxes, may, in order to prevent a re-entry by the lessor, pay such rent and taxes and be subrogated to all of the rights of the lessor against the assignee for his default. *Dunlop v. James*, 174 N. Y. 411 (67 N. E. Rep. 60). Where property subject to three mortgages is purchased on foreclosure of the second mortgage by one who is ignorant of the fact that the third mortgagee had no notice of the foreclosure, and such purchaser afterward purchases a release of the first mortgage, he is entitled, as against such third mortgagee, to be subrogated to the liens of the first and second mortgages. *Home Inv. Co. v. Clarson*, 15 S. Dak. 513 (90 N. W. Rep. 153).

Sec. 211. Subrogation—Rights of life tenant and sureties. A tenant for life of land who also is a tenant in remainder of an interest therein may in either capacity redeem the premises from a mortgage and be subrogated to the lien thereof as against the interests of the other remaindermen; and this right is not lost by her procuring a cancellation of the mortgage of record and devising all of her property to one of the remaindermen. *Kinkead v. Ryan*, 64 N. J. Eq. 454 (53 Atl. Rep. 1053). A life tenant discharging a mortgage on the premises is entitled to subrogation to the rights of the mortgagee as against the remaindermen to the extent they were required to pay the mortgage to protect their estate, regardless of the fact that at the time of paying the mortgage he believed himself to be the owner in fee of the premises; and this right of subrogation passes to a devisee of the life estate. *Wilder's Ex'x v. Wilder*, 75 Vt. 178 (53 Atl. Rep. 1072). A subsequent indorser of a negotiable note, who pays a judgment on it in favor of the holder against the maker, a prior indorser and a subsequent indorser, the maker being insolvent, is entitled in equity to subrogation to the lien of the judgment against such prior indorser. *Schilb v. Moon*, 50 W. Va. 47 (40 S. E. Rep. 329). A wife who joined her husband in the execution of a mortgage reciting that "the debt is a joint and several one,"

but who was in fact his surety, may show such suretyship in an action brought by her to pay the mortgage and be subrogated to the rights of the mortgagee. *Snook v. Munday*, 96 Md. 514 (54 Atl. Rep. 77).

Sec. 212. Subrogation—One furnishing money to pay debt of another or discharge prior lien. Where one having no interest in the matter advances money to pay the debt of another, he can not claim subrogation to the right of the creditor, in the absence of an express or implied agreement to that effect. *Sackett v. Stone*, 115 Ga. 466 (41 S. E. Rep. 564). One advancing money to pay a mortgage debt at the instance of the maker of the mortgage is not a mere volunteer and may be entitled to subrogation. *Motes v. Roberson*, 133 Ala. 630 (32 So. Rep. 225). Agents of a mortgagee, to whom he has indorsed interest coupons for collection, who, without the knowledge of the mortgagee or mortgagor on failure of the latter to pay the same, remits the amount of such coupons to the mortgagee, does not thereby acquire any right to subrogation to the rights of the mortgagee, or any lien on the mortgaged property. *Bennett v. Chandler*, 199 Ill. 97 (64 N. E. Rep. 1052). One furnishing money to discharge a lien on land, taking as collateral security a note supposed to be secured by a mortgage on the land, is entitled to be subrogated to the lien which his money was used to discharge, where the mortgage is found to be defective. *State Nat. Bank v. Vicroy*, (Ky.) 70 S. W. Rep. 183 (24 Ky. Law Rep. 892). One who furnishes money for the purpose of discharging a mortgage lien upon real estate can not claim subrogation to the rights of the mortgagee, in the absence of an agreement or understanding that the mortgage is to be kept alive for his benefit, or that he shall be given a lien on the premises in lieu of the one which has been discharged. *Meeker v. Larson*, Neb. (90 N. W. Rep. 958; 57 L. R. A. 901). See opinion for discussion of this subject.

Sec. 213. Equitable relief from mistakes—Contribution. While a court of equity will sometimes grant relief where parties have contracted under a mutual mistake of law, yet, where the means of knowledge were equal, and no undue advantage was taken, such court will not interpose its powers when the effect of a decree would be to give to one litigant and take from another something of value, not in contemplation by

the parties at the time of the contract, without any consideration being paid therefor. *Jeakins v. Frazier*, 64 Kan. 267 (67 Pac. Rep. 854). One who, when acting in good faith and under the advice of counsel, attempts to redeem from an execution sale of property, but fails to do so on account of a mistake of law, is entitled to relief in equity, where it appears that at all times he has offered to do equity. *MacKay v. Smith*, 27 Wash. 442 (67 Pac. Rep. 982). One claiming title to a part of mortgaged lands through a deed which misdescribes the lands conveyed, but which he is entitled to have reformed, who is not made a party to the foreclosure of the mortgage, may have an action to redeem or to compel the mortgagee, who has purchased the premises to elect whether he will accept the amount due on the mortgage or release the land claimed by such grantee; but he must make such allegations in his petition for relief as will enable a court of equity to determine the equitable rights of the parties and make a proper decree for their enforcement. *Coughanour v. Hutchinson*, 41 Or. 419 (69 Pac. Rep. 68). A wife owning land with her husband as a joint tenant, who takes a conveyance of his interest without covenants after a decree enjoining a sale of such interest on execution, based on the theory that they held the lands as tenants by entireties, and that his undivided interest was not subject to execution, can not after a reversal of such decree and decision that they held as joint tenants, recover of her husband and his creditors on the ground of contribution. *Hancock v. Wiggins*, 28 Ind. App. 449 (63 N. E. Rep. 242).

Sec. 214. Equitable conversion. An absolute necessity to sell real estate in order to comply with the terms of a will as to the division of the property devised will work a conversion, although the will contains no express direction to sell. *In re Keim's Estate*, 201 Pa. St. 609 (51 Atl. Rep. 337). The positive direction by a testator to sell all of his real estate, and to blend the proceeds with his personal property in one fund for the distribution of his whole estate according to the scheme of the will, makes an absolute conversion for all purposes into personal property, which should be distributed as personal property, even if the special object intended by the testator should fail. And the effects of the conversion extend to and may be claimed not only by those who claim under or through the will, but also by those who are not entitled under the will, but are entitled directly from or under the testator.

Hutchings v. Davis, 68 O. St. 160 (67 N. E. Rep. 251). The conversion of realty into personalty through the doctrine of equitable conversion from a direction in a will that it should be sold and the proceeds distributed among certain persons named, does not operate to authorize an administrator with the will annexed to sell it in any other manner than that authorized by the statute. *McElroy v. McElroy*, 110 Tenn. 137 (73 S. W. Rep. 105). The court say: "Under the operation of this doctrine, the property is treated as personalty or realty, as the case may be, only for certain purposes—mainly, as determining succession. The remedy or the mode of actual conversion from one species of property into the other is not affected. *Shaw v. Chambers*, 48 Mich. 355 (12 N. W. Rep. 486). The same principle was recognized by this court in *Wayne v. Fouts*, 108 Tenn. 145, 158 (65 S. W. Rep. 471)." Where real estate is converted into money under the terms of a will for the purpose of distribution among the legatees, the share of one of the legatees which has lapsed by her death before the testator will descend as real estate. *Canfield v. Canfield*, 62 N. J. Eq. 578 (50 Atl. Rep. 471). For a discussion of the doctrine of equitable conversion, see *Condit v. Bigalow*, 64 N. J. Eq. 504 (54 Atl. Rep. 160); *In re Sauerbier's Estate*, 202 Pa. St. 187 (51 Atl. Rep. 751).

ESTATES.

EPITOME OF CASES.

Sec. 215. Creation of fee-simple estate. Where the granting clause in a deed is to one to have and to hold to him and his heirs and assigns forever, a fee is conveyed to him, notwithstanding a later stipulation in the deed "and after the death of said second part the land hereby conveyed shall go to his children by his first wife." *Humphrey v. Potter*, (Ky.) 70 S. W. Rep. 1062 (24 Ky. Law Rep. 1264). A devise by a testator to his son of all of his estate "to have and to hold the same to him, his heirs, assigns, executors and administrators, to his and their use and behoof forever," gives the son an estate in fee. *Smith v. Rice*, 183 Mass. 251 (66 N. E. Rep. 806).

For particular deeds and devises held to create a fee simple estate, see *Smith v. Schlegal*, 51 W. Va. 245 (41 S. E. Rep. 161); *Bishop v. Tinsley*, 64 S. C. 180 (41 S. E. Rep. 895); *Bowen v. John*, 201 Ill. 292 (66 N. E. Rep. 357); *Smith v. Smith*, (Ky.) 72 S. W. Rep. 766 (24 Ky. Law Rep. 1964); *Feit v. Richard*, 64 N. J. Eq. 16 (53 Atl. Rep. 824); *Smith v. Phillips*, 131 Ala. 629 (30 So. Rep. 872); *Acree v. Dabney*, 133 Ala. 437 (32 So. Rep. 127). Where, at the death of a testator devising lands to one for life with the remainder in fee to the heirs of her body, such devisee has no such heirs, the fee vests in the heirs of the testator subject to be divested upon the death of the devisee leaving heirs of her body, and a grantee of the fee of the heirs of the testator take subject to such contingency. *Peterson v. Jackson*, 196 Ill. 40 (63 N. E. Rep. 643).

Sec. 216. Creation of fee-simple estate—Limitations on a fee. An estate in fee created by a will can not be cut down or limited by a subsequent clause, unless it is as clear and decisive as the language of the clause which devises the real estate. *Roberts v. Crume*, 173 Mo. 572 (73 S. W. Rep. 662). A subsequent clause directing the disposition of any remainder which may be undisposed of at the death of the devisee, is not sufficient for such purpose. *Roth v. Rauschenbusch*, 173 Mo. 582 (73 S. W. Rep. 664; 61 L. R. A. 455), collating and reviewing authorities. See *Cox v. Anderson's Adm'r*, (Ky.) 69 S. W. Rep. 953 (24 Ky. Law Rep. 721); *Cox v. Anderson's Adm'r*, (Ky.) 70 S. W. Rep. 839 (24 Ky. Law Rep. 1081). Nor is a subsequent request that the first devisees devise the property to certain persons in case of their death without children. *Igo v. Irvine*, (Ky.) 70 S. W. Rep. 836 (24 Ky. Law Rep. 1165). In Vermont it is held that where it appears to be the manifest intention of the testator, a devise of property in absolute terms may be reduced by a subsequent clause in the will specifically devising to others what remains of the property after the first devisee's death. In re *Keniston's Will*, 73 Vt. 75 (50 Atl. Rep. 558). See opinion for discussion of this subject. A conveyance to one for life with remainder to her bodily heirs, if any, and in default thereof to certain persons named, does not contravene the rule that a fee can not be limited on a fee, but contains an alternative limitation of two fees upon the life estate. *Chapin v. Nott*, 203 Ill. 341 (67 N. E. Rep. 833).

Sec. 217. Estates tail—Creation and conversion into other estates. An estate tail may be created by a quitclaim deed. *Chew v. Kellar*, 171 Mo. 215 (71 S. W. Rep. 172). Where a testator's will devising separate tracts of land to each of his three sons, all of whom are unmarried and without issue, and to their heirs and assigns forever, contains a stipulation that if either of them "should die, leaving no child or children, then and in that case the survivors or survivor shall inherit the deceased one's portion or portions,—to them, or either of them, their heirs and assigns, forever," each son takes an estate in fee tail in the property devised to him. *Caulk's Lessee v. Caulk*, 3 Pen. (Del.) 528 (52 Atl. Rep. 340). A devise to children "to them only and the heirs of their bodies," creates, at common law, estates in tail which are converted by *Hurd's Ill. Rev. Stat.* 1899, p. 403, § 6 into life estates in the children with remainder in fee to the heirs of their bodies. *Peterson v. Jackson*, 196 Ill. 40 (63 N. E. Rep. 643). A grantee to whom a fee tail is conveyed by deed may by her refusal to accept the deed prevent the application of *Ill. Rev. Stat.*, ch. 30, § 6, which converts a fee tail into a life estate in the first taker, with the remainder in fee simple to those to whom the estate would pass according to the common law on the death of the first taker; and thus deprive those to whom the fee would otherwise pass of their estate. *Spencer v. Spruell*, 196 Ill. 119 (63 N. E. Rep. 621). By *Burns' Ind. Rev. Stat.*, § 3378, estates tail are abolished, and what would be, at common law, an estate tail, is in this state a fee simple. *Teal v. Richardson*, 160 Ind. 119 (66 N. E. Rep. 435). A conveyance to "J. R. during his natural lifetime, and to the heirs of his body begotten on his wife, N. R. in fee simple and forever.

* * * to have and to hold said lands and tenements with the appurtenances to the said J. R. and N. R., his wife, during their joint and several lives, and in fee simple to the heirs of their bodies, lawfully begotten, and their assigns, forever," passes to such grantees a fee simple estate, under *Burns' Ind. Rev. Stat.*, § 3378, providing that "all estates tail are abolished; and estates which according to the common law would be adjudged a fee tail shall hereafter be adjudged a fee simple; and if no valid remainder shall be limited thereon, shall be a fee simple absolute." *Chamberlain v. Runkle*, 28 Ind. App. 599 (63 N. E. Rep. 486). See opinion for discussion of this subject. An estate tail which is converted into a fee by Pa.

Pub Laws 1855, p. 368, was held not to be crated by a devise of land to the testator's four sons "during their natural lives and at their deaths to their or each of their nearest male heirs." *Jones v. Jones*, 201 Pa. St. 458 (51 Atl. Rep. 362). For particular case applying this statute in which the contrary is held, see *Simpson v. Reed*, 205 Pa. St. 53 (54 Atl. Rep. 499).

Sec. 218. Rule in Shelley's case. In Rhode Island it is held that the rule applies by analogy to a devise of personality unless a contrary intent appears. *Evans v. Weatherhead*, 24 R. I. 502 (53 Atl. Rep. 866). The rule applies to a conveyance to S. "for the term of his natural life, and at his death to his children or heirs." *Shapley v. Diehl*, 203 Pa. St. 566 (53 Atl. Rep. 374). A will devising to one a life estate, subject to a contingent remainder in fee to his sisters, if they should survive him, with a contingent remainder in fee, if they did not take, to his heirs, passes to the first devisee a fee, upon the death of his sisters, the rule in Shelley's case then applying. *McNeal v. Sherwood*, 24 R. I. 314 (53 Atl. Rep. 43). A devise of real estate to his daughter "to have and to hold during her natural life * * * and the remainder after her death to the heir or heirs of her body in fee simple," comes within the rule and vests a fee in the daughter, there being nothing which clearly and unequivocally shows that the word 'heirs' was not used in its strict legal sense. *Teal v. Richardson*, 160 Ind. 119 (66 N. E. Rep. 435). See opinion for discussion of this subject. A conveyance "to J. and her heirs, but in case of no heirs the land to revert to the parties of the first part," with a habendum, "to have and to hold the said premises unto the said party of the second part, her heirs and assigns, forever," was held to be within the rule. *Davis v. Sturgeon*, 198 Ill. 520 (64 N. E. Rep. 1016). For particular devise held to be within the rule, see *McCann v. Barclay*, 204 Pa. St. 214 (53 Atl. Rep. 767). The rule was held not to apply to a devise of land to the testator's four sons "during their natural lives and at their deaths to their or each of their nearest male heirs." *Jones v. Jones*, 201 Pa. St. 458 (51 Atl. Rep. 362). The rule in Shelley's case is abolished in Michigan, by Comp. Laws, § 8810, and a conveyance to one during her natural life only, with remainder in fee to the heirs of her body surviving, gives the first taker only a life estate. *Wilson v. Terry*, 130 Mich. 73 (89 N. W. Rep. 566).

Sec. 219. Life estates—Creation of—Miscellaneous notes. A surviving wife can not claim a life estate in lands of her deceased husband which had been conveyed by their joint deed, on account of his having delivered the deed before his death in violation of a verbal agreement between them that the deed should not be delivered during her lifetime. *Smith v. May*, 3 Penn. (Del.) 233 (50 Atl. Rep. 59). The reservation of a room in a house conveyed and a living with the grantee so long as the grantor survive does not create a life estate. *Darrah v. Darrah*, 202 Pa. St. 492 (52 Atl. Rep. 183). The use of the word "assigns" will not have the effect of enlarging what would otherwise be a life estate into a fee simple. *Chew v. Kellar*, 171 Mo. 215 (71 S. W. Rep. 172). Where the children of a decedent inheriting from him the fee of an undivided two-thirds of lands of which he died seized all join in a quitclaim deed thereof to his widow owning the other third "to have and to hold during her natural life and no longer," in which she "expressly agrees that she will not in any way, directly or indirectly, incumber or convey any of said real estate, or suffer the same to be incumbered or conveyed, and that she will pay all taxes thereon accrued or hereafter to accrue, and that she will pay all of the indebtedness against the estate of her deceased husband," and that at her decease all of said realty shall go and belong to the heirs at law of said husband and herself, according to the laws of descent; and on the deed, below the certificates of acknowledgment of the grantors, this statement, "I accept this deed according to the conditions contained therein," is signed by the widow, it is held that the effect of the deed was to reserve a life estate to the widow, and to convey the remainder in fee of her undivided one-third to the children. *Adams v. Alexander*, 159 Ind. 175 (64 N. E. Rep. 597). Particular deeds and wills held to create a life estate, *Holland v. Keyes*, 24 R. I. 289 (52 Atl. Rep. 1094); *Chew v. Kellar*, 171 Mo. 215 (71 S. W. Rep. 172); *In re Keniston's Will*, 73 Vt. 75 (50 Atl. Rep. 558); *Hill v. Giles*, 201 Pa. St. 215 (50 Atl. Rep. 758); *Winchester v. Hoover*, 42 Or. 310 (70 Pac. Rep. 1035); *Utter v. Sidman*, 170 Mo. 284 (70 S. W. Rep. 702); *Shealy v. Wammock*, 115 Ga. 913 (42 S. E. Rep. 239); *Griffiths v. Griffiths*, 198 Ill. 632 (64 N. E. Rep. 1069); *Turner v. Hause*, 200 Ill. 464 (65 N. E. Rep. 445); *Metzen v. Schopp*, 202 Ill. 275 (67 N. E. Rep. 36). Remaindermen, whether their interest be vested or contingent, may appeal to a court of equity to prevent the life tenant from wasting and destroying the corpus of the estate.

Kollock v. Webb, 113 Ga. 762 (39 S. E. Rep. 339). Cal. Code Civ Proc., § 1723 construed and applied—proceedings for the termination of a life estate. In re Tracey, 136 Cal. 385 (69 Pac. Rep. 20). Ia. Code, § 2988 construed and applied—death of life tenant during his lease of the premises—apportionment of rents. Gudgel v. Southerland, 117 Ia. 309 (90 N. W. Rep. 623).

Sec. 220. Duty of life tenant to pay taxes—Rights, liabilities and remedies. It is the duty of the life tenant to pay taxes accruing during the life estate. Jeffers v. Sydnam, 129 Mich. 440 (89 N. W. Rep. 42). A remainderman who causes the property to be assessed for taxes in his own name and pays such taxes before they become delinquent, all without the authority of the life tenant, can not recover such payments from the latter. Huddleson v. Washington, 136 Cal. 514 (69 Pac. Rep. 146). It is the duty of a life tenant to pay taxes when the estate is sufficient for that purpose, and his failure to do so constitutes waste, for which a remainderman who has been compelled to pay the taxes may sue in equity to recover the same and for the declaration of a lien on the life tenant's interest therefor, and for a receiver to take charge of the property for the purpose of paying future taxes, etc. Abernathy v. Orton, 42 Or. 437 (71 Pac. Rep. 327; 95 Am. St. Rep. 774). The court say: "Waste is the deherison of the remainderman or reversioner. Livingston v. Reynolds, 26 Wend. 122. 'Deherison' is defined to be disinheriting, a depriving or putting out of an inheritance (Burrill Law Dict.); and the old writ of waste called upon the tenant to appear and show cause why he had committed waste and destruction in the place named, to the deherison of the plaintiff. (3 Bl. Comm. 228). It thus appears that any act or omission of the tenant which deprives the person in remainder or reversion of the inheritance is waste. In Clark v. Middlesworth, 82 Ind. 240, the court, commenting upon the principle thus announced, said. 'If, through the failure of the tenant to pay the taxes, if the income of the estate is sufficient to discharge them, the estate is sold and conveyed to another, beyond the power of the remainderman to recover it, it is, as to him, destroyed, wasted, and the inheritance gone; and the tenant should pay for the lot.' In Phelan v. Boylan, 25 Wis. 679, it was held that a tenant for life who neglects to pay taxes after his tenancy commences is liable to an action for waste; Mr. Chief Justice Dixon saying: 'And in

this case the plaintiffs might have sued under the statute, and obtained judgment for double the amount of damages found by the jury. Rev. Stat., ch. 143, §§ 1 to 6, inclusive. But in *Cairns v. Chabert*, 3 Edw. Ch. 312, a bill in equity was sustained against the tenant for life to restrain the disposition of property, and to compel the tenant to keep down assessments and taxes; and upon motion an order was entered for the appointment of a receiver of so much of the rents and income of the estate as should be necessary to pay off the taxes in arrear, unless within forty days from service of a copy of the order the tenant should show to the satisfaction of the master that the taxes had been paid. It should seem from this that the nonpayment of taxes by the tenant constitutes substantive ground for relief in equity, notwithstanding the remedy at law to recover damages for waste. And there may be good reason for this. The remedy at law may be, and no doubt is, inadequate. The tenant may be insolvent, or other circumstances exist rendering the judgment for damages of no value.' In *Murch v. Manufacturing Co.*, 47 N. J. Eq. 193 (20 Atl. Rep. 213), it was held that if a tenant for life refuses to keep down the taxes, or to make repairs which he is legally bound to do, a receiver would be appointed to collect the rents sufficient in amount to discharge the liabilities of the tenant's estate for which they are answerable. In *Trust Co. v. Mintzer*, 65 Minn. 124 (67 N. W. Rep. 657, 32 L. R. A. 756; 60 Am. St. Rep. 444), a life tenant in a homestead estate having neglected and refused to pay taxes or make repairs thereon for many years, in order to save the estate from entire loss to the reversioners the taxes were paid by the administrator with the will annexed, having power so to do by the express terms of the will; and it was held by the supreme court of Minnesota that such an administrator might proceed in equity to have a receiver appointed to take charge of the premises, collect the income or rentals of the property, and apply the proceeds to the payment of the taxes and necessary expense of repairs, and reimburse the administrator for such taxes and expenses so paid, and also pay from such income any unpaid taxes or expense for repairs necessarily made to save the property, and that if such rental is insufficient the receiver may, under authority and direction of the trial court, proceed to sell the life estate of the defendant in the premises, or so much thereof as may be sufficient for such purpose. The cases to which attention has been called proceed upon the theory that the neglect or refusal of

the tenant for life to pay the current taxes, whereby the interest of the remainderman in the premises is in danger of being forfeited, constitutes waste (28 Am. & Eng. Enc. Law, 890), going to the destruction of the estate, to prevent which equity will intervene, and by the appointment of a receiver subject the rents and profits to the payment of the delinquent taxes. The defendant having refused to pay the current taxes, although the rent received by him was sufficient for that purpose, the plaintiffs were compelled to discharge them to protect their interests in the premises; and as such refusal constituted waste, jeopardized the estate, and tended to its destruction, equity for that reason had jurisdiction of the subject matter, and no error was committed in overruling the demurrer."

Sec. 221. Sale and conveyances of life estate. A grantee in a warranty deed purporting to convey a fee simple estate executed by a widow endowed with a life estate in lands, under 2 How. Ann. Mich. Stat., § 5772a, subd. 2, takes only a life estate. Comp. Laws, § 8814, applied. *Jeffer v. Sydnam*, 129 Mich. 440 (89 N. W. Rep. 42). One to whom the income of an estate is devised for her life, to be paid over "at such times and in such sums" as the testator's executors "may deem judicious," has power of alienation, and a deed by her of her interest in such income over a certain sum per annum is valid. *Endicott v. University of Virginia*, 182 Mass. 156 (65 N. E. Rep. 37). Where, in a suit by a life tenant brought to protect the estate from destruction by taxes and other liens, there is a judgment authorizing the sale of certain lots, the court has power to order the sale of additional lots where the amount realized on the first sale is insufficient to satisfy the liens. *Ruggles v. Tyson*, 114 Wis. 301 (90 N. W. Rep. 113). Ky. Civ. Code Prac., § 498 construed and applied—lands held in trust for the life of another—power of court to empower trustee to sell. *Burge v. Fidelity Trust & Safety Vault Co.*, 112 Ky. 683 (66 S. W. Rep. 763; 23 Ky. Law Rep. 1925). Va. Laws 1897-98, p. 404, construed and applied—proceedings to sell life estate—who may bring. *Lantz v. Massie*, 99 Va. 709 (40 S. E. Rep. 50).

Sec. 222. Conveyance of expectant estates. A sale of an expectancy in lands of a living ancestor may be enforced through the doctrine of estoppel springing from covenants in a deed. *Johnson v. Johnson*, 170 Mo. 34 (70 S. W. Rep. 241;

59 L. R. A. 749). Citing, *Steele v. Frierson*, 85 Tenn. 430 (3 S. W. Rep. 649); *Bohon v. Bohon*, 78 Ky. 408; *Somes v. Skinner*, 3 Pick. 52; *Robertson v. Wilson*, 38 N. H. 48; *House v. McCormick*, 57 N. Y. 310; *Habig v. Dodge*, 127 Ind. 31 (25 N. E. Rep. 182), followed and approved in *Jerauld v. Same*, 127 Ind. 600 (25 N. E. Rep. 186); *Fairbanks v. Williamson*, 7 Me. 96; *Stover v. Eycleshimer*, 46 Barb. 84; *Rosenthal v. Mayhugh*, 33 O. St. 155; *Read v. Fogg*, 60 Me. 479.

Sec. 223. Remainders—General principles—Contingent and vested. A vested remainder is alienable and may be sold on execution. *Kinhead v. Ryan*, 64 N. J. Eq. 454 (53 Atl. Rep. 1053). A contingent remainder is created by a testator's will which gives a life estate to his wife and then provides that on her death the property should be divided among his "children or their heirs as the law directs," the will meaning that the heirs of a child dying before the life tenant took thereunder. *Taylor v. Taylor*, 118 Ia. 407 (92 N. W. Rep. 71). To the same effect is *Howbert v. Cawthorn*, 100 Va. 649 (42 S. E. Rep. 683). A deed to one for life with remainder to her bodily heirs, if any, and in default thereof to certain persons named in the deed, as remaindermen, creates a vested remainder. *Chapin v. Nott*, 203 Ill. 341 (67 N. E. Rep. 833). A devise of land by a testator to one "to vest in her in fee upon the decease of my said wife to have and to hold forever," passes a vested remainder to the devisee which is not defeated by her death before that of the widow. *Lewis v. Howe*, 174 N. Y. 340 (66 N. E. Rep. 975). A devise of land by a testator to his wife for life, and after her death to his four children, with a provision that "if any of my said children should die before my said wife, then it is my will that upon my wife's death the share of my said estate which would have gone to such deceased child if living shall go to the heirs at law of such deceased child," creates in each child a vested remainder subject to its being divested by his death before his mother. *Kinhead v. Ryan*, 64 N. J. Eq. 454 (53 Atl. Rep. 1053). Where a testator having a wife, a daughter and three sons, two of whom are insolvent, devises a small sum to each of his children and then gives all of his property to his wife "for and during her widowed life, and as long as she remains single," without power of disposal, and then provides that "in the event that my said wife shall not be living at the time of my death," the property shall pass to the daughter, one of the sons and the wives of the other

two sons who are the insolvent ones, it is held that there is a devise of the remainder to these persons, although testator's wife survived him. *Robards v. Brown*, 167 Mo. 447 (67 S. W. Rep. 245). The children of a testator living at the time of his death are held to take a vested remainder under his will devising property to his wife for life "and then to be divided among my children by will or otherwise as she may deem best." *Lantz v. Massie*, 99 Va. 709 (40 S. E. Rep. 50). The court say: "It may be stated as a conclusion from the authorities on this subject 'that a remainder will be considered as vested, although the instrument by which it is created gives to a trustee a power whose exercise may destroy the interest, and although the contingency which is to cause its divesture is within the control of the particular tenant.' *Rogers v. Rogers*, 11 R. I. 38; *Moore v. Weaver*, 16 Gray, 305; *Bennett v. Garlock*, 79 N. Y. 302 (35 Am. Rep. 517); *Shattuck v. Stedman*, 2 Pick. 468; *Poor v. Considine*, 6 Wall. 458 (18 L. Ed. 869); *Moore v. Lyons*, 25 Wend. 119; *Chew's Appeal*, 37 Pa. 23." In Rhode Island it is held that where a will devising a life estate to the testator's wife stipulates that "upon the decease of my said wife, the property by this and the preceding clause devised shall belong to my children, the descendants of any deceased child to take the share their parent would have taken if living, and if no descendants of mine survive my said wife, then said property shall belong" to certain named persons, it is held that the interest of testator's children did not vest until the termination of the widow's life estate. *In re Melcher*, 24 R. I. 575 (54 Atl. Rep. 379). In construing a very similar will it is held in Indiana that the interest of the testator's children vested at his death. *Burke v. Barrett*, 31 Ind. App. 635 (67 N. E. Rep. 552). See *Sumpter v. Carter*, 115 Ga. 893 (42 S. E. Rep. 324). Where a will devising to one a life estate gives the remainder to any surviving child of the life tenant, and in default thereof to such tenant's brothers and sisters, and all of them are living at testator's death, but the life tenant is childless, the brothers and sisters take a vested, and not a contingent, remainder, notwithstanding a liability to a defeat of their interests by subsequent issue born to the life tenant; and such vested interest may give a right of dower to the wife of a remainderman, and it may be conveyed. *Boatman v. Boatman*, 198 Ill. 414 (65 N. E. Rep. 81). For particular deeds and devises held to create vested remainders, see *Hoover v. Smith*, 96 Md. 393 (54 Atl. Rep. 102); *Burton v. Provost*, 75 Vt. 199 (54 Atl.

Rep. 189); *Tindall v. Tindall*, 167 Mo. 218 (66 S. W. Rep. 1092); *Moore's Adm'r v. Sleet*, Ky. (68 S. W. Rep. 642; 24 Ky. Law Rep. 426); *Rudd v. Traveler's Ins. Co.*, (Ky.) 73 S. W. Rep. 759 (24 Ky. Law Rep. 2141). For a particular case in which a vested remainder was held to open up to admit after-born children, see *Blackburn v. Blackburn*, 109 Tenn. 674 (73 S. W. Rep. 109).

Sec. 224. Contingent remainder—Sale on execution.

A contingent remainder can not be sold for the benefit of the creditors of a possible remainderman. *Howbert v. Cawthorn*, 100 Va. 649 (42 S. E. Rep. 683). Construing and applying statutory provisions (Ia. Code, § 48, subd. 8; § 3801), providing that judgments "are liens upon the real estate owned by the defendants" and that real estate "includes lands, tenements, hereditaments, and all rights thereto and interests therein," it is held that, where the uncertainty of the contingent remainder involves solely the question of who shall take the real estate, it is not, before vesting, the subject of levy and sale under execution. *Taylor v. Taylor*, 118 Ia. 407 (92 N. W. Rep. 71). Substantially the same is held in Tennessee under a similar statute (*Shannon's Code*, § 63). *Nichols v. Guthrie*, 109 Tenn. 535 (73 S. W. Rep. 107). The court say: "The present certainly falls within the class of cases where the event on which the contingency depends is certain, while the person to take on the happening of the event is uncertain. For which one, if any, of the children of Elizabeth Sims would survive her, and then be capable of taking the remainder, was uncertain until her death occurred, and whatever interest either of these children had in the remainder was a pure expectancy.

It would seem, on principle, that such an interest or expectancy, not transmissible at common law, was beyond the reach of an execution creditor. Whether a contingent remainder of any kind can be subjected by a judgment creditor, may be regarded as an open question in this state, though in *Henderson v. Hill*, 9 Lea, 34, in the form of a dictum, it is said: 'The weight of authority seems to be that a legal contingent remainder is not subject to execution'—citing *Freeman on Execution*, § 175. Upon examination of the cases, we think it will be found that this statement, though a dictum, is correct. At least, such was the holding in *Watson v. Dodd*, 68 N. C. 528; *Haward v. Peavey*, 128 Ill. 430 (21 N. E. Rep. 503; 15 Am. St. Rep. 120); *Ducker v. Burnham*, 146 Ill. 9 (34 N. E. Rep. 558;

37 Am. St. Rep. 135); *Roundtree v. Roundtree*, 26 S. C. 450 (2 S. E. Rep. 474); *Young v. Young*, 89 Va. 675 (17 S. E. Rep. 470; 23 L. R. A. 642). *Jackson v. Middleton*, 52 Barb. 9; *Moore v. Littel*, 41 N. Y. 66, and *Woodgate v. Fleet*, 44 N. Y. 9, are cited as contra, but the first of these cases simply held that an interest, vested or contingent, is alienable during the continuance of the antecedent estate, while in the second the argument of the court was mainly devoted to the determination of the question whether the remainder involved was contingent or vested."

Sec. 225. Creation of estates upon condition—Condition subsequent. An absolute estate in fee simple is conveyed by a deed of land to a county, notwithstanding a recital in it that it was to be used for court house purposes, where it contains no provisions for forfeiture, or that the property should revert to the grantor under any circumstances. *Garfield Tp. v. Herman*, 66 Kan. 256 (71 Pac. Rep. 517). But where an absolute conveyance of lands for a specified use contains a clause that in case their use for that purpose shall be discontinued the lands should revert to the grantor, his heirs and assigns, the estate taken is subject to being defeated by breach of the condition. *Methodist Protestant Church v. Young*, 130 N. C. 8 (40 S. E. Rep. 691). A condition subsequent is created by a deed of land to a city for the purpose of building a city hall thereon, where it stipulates that if the land shall ever cease to be used by the city for a city hall or other city buildings, it shall revert back to the grantors; and a failure of the city for ten years to erect a building in compliance with such condition is a sufficient breach to authorize a re-entry by the grantor. *Trustees of Union College v. City of New York*, 173 N. Y. 38 (65 N. E. Rep. 853; 93 Am. St. Rep. 569; see pp 572-578 for exhaustive note on "Mode of taking advantage of breaches of conditions subsequent"). A conveyance to the trustees of a church "to have and to hold the said lot of ground for mission school purposes," without any provision as to the erection of a building thereon or for reversion in case of non-user of the ground for the purpose named, does not create a conditional estate, and the grantee has a good marketable title in fee simple. *Rankin Regular Baptist Church v. Edwards*, 204 Pa. St. 216 (53 Atl. Rep. 770). A condition in a devise by a father to his son that the devisee should be christened and baptized by a certain name, and that he shall maintain and be

known by that name during his natural life, is a reasonable and enforceable condition subsequent, and the property reverts to the testator's heirs where there has not been a substantial and bona fide compliance with the condition. *Smith v. Smith*, 64 Neb. 563 (90 N. W. Rep. 560). An estate upon condition subsequent is created by a deed conveying two successive life estates upon condition that the successive life tenants shall not convey their interests and shall occupy the premises during their lives. *Lewis v. Lewis*, 74 Conn. 630 (51 Atl. Rep. 854; 92 Am. St. Rep. 240). For exhaustive note on "Validity of conditions and restrictions in deeds," see 95 Am. St. Rep. 214-224.

Sec. 226. Creation of estates upon condition—Stipulation against use of town lots as a place to handle grain. A condition in a deed of town lots that no building shall ever be erected on all or any part of them in which to handle grain, and that no grain should ever be handled on the land, is not void as against public policy, though it forbids the erection of a warehouse thereon; nor does such a condition violate the rule against perpetuities. *Wakefield v. Van Tassell*, 202 Ill. 41 (66 N. E. Rep. 830; 95 Am. St. Rep. 207. See p. 214-220 for exhaustive note on "Validity of conditions and restrictions in deeds"). The court say: "A condition that a school house should not be erected on the premises—*McKissick v. Pickle*, 16 Pa. 140,—or a distillery, or a machine shop for iron manufacture, or a hospital or a cemetery, have all been held to be valid conditions—*Plumb v. Tubbs*, 41 N. Y. 444. A stipulation in a deed that the premises conveyed should not be used or occupied as a hotel—*Stines v. Dorman*, 25 O. St. 580,—and a condition against the erection of a building for the manufacture of resin oil—*Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35 (13 Am. Rep. 556)—and a condition that the grantor should have the exclusive right to sell beer to any public house erected on the land conveyed—*Colt v. Towle*, Eng. Ch. App., decided in 1859—were held enforceable conditions. A condition that neither the premises nor the building erected thereon was to be used at any time thereafter as a public house—*Post v. Bernheimer*, 31 Hun, 247,—also a condition in a deed to the county on the express condition that the county would 'erect thereon, within five years, a court house for the use of the said county, and keep and maintain the same thereon for the space of ten years'—*Pepin Co. v. Prindle*, 61 Wis. 301 (21 N. W. Rep.

254),—have been held valid. And where an estate was conveyed on the condition of not placing a window on the north side of the house, and the grantor was never the owner of the land adjoining on the north side, and the estate was afterwards mortgaged by the grantee, it was held that the whole estate, both of the mortgagor and mortgagee was forfeited on condition broken. *Gray v. Blanchard*, 25 Mass. 284.

In *People v. Chicago Gas Trust Co.*, 130 Ill. 268 (22 N. E. Rep. 798; 8 L. R. A. 497; 17 Am. St. Rep. 319), this court said: 'Public policy is that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public, or against the public good.' The question, then, in this case to determine, is, does the condition in the deed have a tendency to be injurious to the public or to be against the public good? It will be observed that in this deed the only condition contained therein was that no grain elevator should ever be built thereon, or grain ever be handled thereon. It left the estate free to be used for any and for all other purposes whatsoever, and was not subversive of the estate, and did not destroy or limit its alienable or inheritable character. *Cowell v. Colorado Springs Co.*, 100 U. S. 55 (25 L. Ed. 547). The condition, as made at the time of the deed between the parties, appears to have been a reasonable one, and the intent of the parties to the deed is clear. There is no showing in the record that the situation of the property or surroundings have changed, so as to make the condition at the present time an unreasonable one; and we can not see that there would result any certain and substantial advantage to the public by holding the condition in this deed void. The parties have seen fit to place such a condition in the deed, the intention being clear and free from doubt, and the same not being *malum in se* or *malum in prohibitum*, and not contrary to public policy, the court must enforce the same. *Hutchinson v. Ulrich*, 145 Ill. 342 (34 N. E. Rep. 556; 21 L. R. A. 391)."

Sec. 227. Creation of estates upon condition—Conveyance in consideration of support. A deed containing a provision that as a part of the consideration thereof the grantee should remain with the grantor, his aunt, who reserved the right of possession during life, and take care of her during life, is held not to create an estate upon condition subsequent, but the provision was a covenant to render the services. *Low-*

man v. Crawford, 99 Va. 688 (40 S. E. Rep. 17). A conveyance of land by a warranty deed accompanied by an agreement on the part of the grantees to support the grantors for life, etc., in which it was stipulated that "until said conditions are fully complied with this agreement shall be a lien on the said above-described lands to the full sum of eight hundred dollars," does not create an estate upon condition subsequent. Van Horn v. Mercer, 29 Ind. App. 277 (64 N. E. Rep. 531). No breach of a condition in a deed that the grantee shall support the grantor on the premises arises, where the nonsupport is due to the grantor absenting himself from the premises without cause. Lewis v. Lewis, 74 Conn. 630 (51 Atl. Rep. 854; 92 Am. St. Rep. 240). In an opinion exhaustively reviewing its own decisions upon the rights and remedies of a grantor conveying property in consideration of his support, upon a breach of condition by the grantee, the supreme court of Wisconsin holds that the relief in such a case can not go upon the ground of forfeiture for nonperformance of a condition subsequent; but "by repeated decisions of this and other courts the law has been firmly established that where a son obtains title and possession of his father's property, giving as a consideration therefor his promise to support the grantor for life, such promise, whether the manner in which it is to be kept be definitely specified in the writings or not, is not delegable; that the property conveyed is held upon condition subsequent; that for a breach thereof the title thereto will, at the election of the grantor, no sufficient equitable considerations to the contrary standing in the way, revert without judicial aid, the same as in any other case of breach of condition subsequent; and that the grantor may have the aid of a court of equity for such appropriate relief as may be necessary to judicially establish his status as regards the property and quiet his title thereto, removing any adverse claim or outstanding paper in regard thereto that may exist, which might be used, presently or in the future, prejudicially to him." *Glocke v. Glocke*, 113 Wis. 303 (89 N. W. Rep. 118; 57 L. R. A. 458). See, on this subject, *Wanner v. Wanner*, 115 Wis. 196 (91 N. W. Rep. 671).

Sec. 228. Breach of condition subsequent—Remedies.

A breach of a condition subsequent does not operate ipso facto to revest the estate in the person entitled to the reversion; the title becomes voidable only upon his election to enforce the remedies given him for the breach. *Lewis v. Lewis*, 74 Conn.

630 (51 Atl. Rep. 854; 92 Am. St. Rep. 240). Forfeiture will not be enforced for breach of a condition subsequent until there has been a re-entry or its equivalent, and this rule applies to the alienee of the grantee as well as to the grantee himself. *Van Horn v. Mercer*, 29 Ind. Ap. 277 (64 N. E. Rep. 531). One of two or more persons holding a vested right of entry for conditions broken may, without actual entry, maintain ejectment for the land involved. *Bouvier v. Baltimore & N. Y. R. Co.*, 67 N. J. L. 281 (51 Atl. Rep. 781; 60 L. R. A. 750). A grantor entitled to maintain ejectment for breach of condition subsequent may do so without previous demand for possession; and he is entitled, by way of damages, to the rents and profits, or the value of the use and occupation of the land, from the commencement of the action. *Trustees of Union College v. City of New York*, 173 N. Y. 38 (65 N. E. Rep. 853; 93 Am. St. Rep. 569; see pp. 572-578 for exhaustive note on "Mode of taking advantage of conditions subsequent"). The power of equity to relieve from forfeiture of an estate on account of a breach of conditions subsequent does not extend beyond situations where there is some room for saying the conditions were inserted to stand as security, either for the payment of money, or the performance of some promise, damages for a breach of which are susceptible of ascertainment by some definite rule, and the doing of the particular thing, or the doing thereof at a particular time, was not the principal object secured by the condition. *Maginnis v. Knickerbocker Ice Co.*, 112 Wis. 385 (88 N. W. Rep. 300). See opinion for exhaustive discussion of this subject.

Sec. 229. Breach of condition subsequent—Transfer of right of entry and remedies. Upon breach of condition after a grantor's death the right of re-entry is in his heirs at law living at the time of the breach. N. C. Code, §§ 2140, 2141, do not operate to make a will by such a grantor pass a right of entry accruing after his death. *Methodist Protestant Church v. Young*, 130 N. C. 8 (40 S. E. Rep. 691). The "Act to authorize the transfer of estates in expectancy" (N. J. Gen. Stat., p. 881), which is still available, may not extend so as to authorize transfer of a right of entry, for condition broken, after the breach; but, independent of statute, such right is, in this state, transferable, after breach, because the policy that in England forbade the transfer, namely, the prevention of maintenance is not in force here. The case of *Schomp v.*

Schenck, 40 N. J. L. 195 (29 Am. Rep. 219), approved. *Bouvier v. Baltimore & N. Y. R. Co.*, 67 N. J. L. 281 (51 Atl. Rep. 781; 60 L. R. A. 750). See opinion for exhaustive historical review of authorities on this subject. Where property has been conveyed on condition subsequent of such a character that a breach thereof would authorize a forfeiture of the estate, and there has been such a breach and re-entry by the grantor for the purpose of enforcing a forfeiture, the title becomes vested in such grantor who may convey the same, and either he or his grantee may then invoke judicial remedies in respect thereto, pleading his title in general terms the same as if that title were dependent upon any other circumstances. *Maginnis v. Knickerbocker Ice Co.*, 112 Wis. 385 (88 N. W. Rep. 300). The grantee of the reversion who accepts a deed from one of two prior grantees to whom successive life estates have been conveyed by his grantor, on consideration that they shall not convey their interests, can not enforce a forfeiture on account of such breach of the condition. *Lewis v. Lewis*, 74 Conn. 630 (51 Atl. Rep. 854; 92 Am. St. Rep. 240).

Sec. 230. Breach of condition subsequent—Waiver of right to enforce forfeiture. Long-continued silence of the grantor, where the grantee had failed to comply with an express condition subsequent, does not preclude him from insisting on a forfeiture and claiming possession of the premises. *Trustees of Union College v. City of New York*, 173 N. Y. 38 (65 N. E. Rep. 853; 93 Am. St. Rep. 569). Mere silence is not sufficient to waive a forfeiture; but silence on one side and conduct in good faith relying thereon on the other, whereby such other is placed in such a situation that he will be greatly damaged if the apparent attitude of his conditional grantor be changed effectively, will bind such grantor as a waiver of the benefit of the condition. Mere silence will not operate as a waiver of the benefit of a condition in case of an intentional breach thereof, though the conditional grantee incur expense which would operate to his prejudice if the grantor were thereafter permitted to insist upon the forfeiture. *Maginnis v. Knickerbocker Ice Co.*, 112 Wis. 385 (88 N. W. Rep. 300).

Sec. 231. Perpetuities. Where the owners of land laid out into building lots, parks and streets conveyed the parks and streets to trustees who were authorized to make improve-

ments, pay taxes, and for such purposes to make assessments against the lots, such a conveyance was held not to be a violation of the rule against perpetuities. *Stevens v. Annex Realty Co.*, 173 Mo. 511 (73 S. W. Rep. 505). The power of alienation of realty is not suspended where there are living parties, however numerous, who have unitedly the entire ownership, and may, presently, lawfully join in an absolute conveyance of the same. *Becker v. Chester*, 115 Wis. 90 (91 N. W. Rep. 87). Whenever lives in being do not form any part of the time of postponement, the only period under the rule against perpetuities is twenty-one years absolute. *Andrews v. Lincoln*, 95 Me. 541 (50 Atl. Rep. 898; 56 L. R. A. 103). The rule is not satisfied by the vesting of the legal estate within the prescribed period, but it seeks out the beneficial estate and demands that it shall vest within such period. But it does not demand that the particular individuals in whom the estate is to vest shall be definitely ascertained at the testator's death; it is enough if it is certain that they will be definitely ascertainable within the period limited after that event. *Bates v. Spooner*, 75 Conn. 501 (54 Atl. Rep. 305). See *Becker v. Chester*, 115 Wis. 90 (91 N. W. Rep. 87). A statute (Wis. Rev. Stat., § 2039) prohibiting the suspension of power of alienation "for a longer period than during the continuance of two lives in being at the creation of the estate and twenty-one years thereafter," is not violated by a will devising real estate in trust and providing that it shall not be conveyed for twenty-one years. In *re Kopmeier*, 113 Wis. 233 (89 N. W. Rep. 134). A will which provided for the accumulation of the testator's estate in the hands of trustees for a gross period of thirty years, without any reference to any life or lives in being, violates the rule, notwithstanding that the trustees are given discretionary authority to expend money for the education, support and maintenance of various beneficiaries. *Andrews v. Lincoln*, 95 Me. 541 (50 Atl. Rep. 898; 56 L. R. A. 103). The common-law rule as to perpetuities respecting personal property is not in force in Wisconsin; and in that state it is held that if realty be conveyed, by will or otherwise, to trustees upon an express trust, with absolute power to convert the same into personalty and hold the equivalent in that form for a period beyond the term for which the absolute power to alienate the realty could be suspended, the trust is valid if, upon such conversion being made, such equivalent will not be fettered by an invalid trust. *Becker v. Chester*, 115 Wis. 90 (91 N. W.

Rep. 87). See opinion for application of rule against perpetuities against trusts; also *Bates v. Spooner*, 75 Conn. 501 (54 Atl. Rep. 305); *Towle v. Doe*, 97 Me. 427 (54 Atl. Rep. 1072).

Sec. 232. Merger—General principles—Conveyance taken by lienholder. The title to a building erected on a portion of land by lessees in a lease expressly stipulating that it is to belong to them, with the right of removal, does not merge in the fee of the land by the owner thereof subsequently acquiring the lease. *Sweet v. Henry*, 175 N. Y. 268 (67 N. E. Rep. 574). Where the record title to land and a mortgage thereon appears in the same person, a merger will be presumed in favor of his subsequent vendee without any notice of facts to the contrary. *Artz v. Yeager*, 30 Ind. App. 677 (66 N. E. Rep. 917). Where a mortgagee accepts a conveyance of the mortgaged property in payment of the mortgage debt and without knowledge of a judgment against his grantor, there is no merger of the mortgage in the fee so as to give the judgment lien priority. *Woodhurst v. Cramer*, 29 Wash. 40 (69 Pac. Rep. 501). A purchase of a prior mortgage by one of several cotenants of a second mortgage will not necessarily be held to be a merger of the two estates so as to render demurrable a bill seeking to establish his subrogation to all the rights of the first mortgagee. *Gleason v. Carpenter*, 74 Vt. 399 (52 Atl. Rep. 966). Where a mortgagee who has taken a conveyance of the mortgaged lands in settlement of the mortgage debt, retaining his mortgage uncanceled, subsequently conveys the land to another without making any assignment of the uncanceled mortgage, but afterward at the request of such grantee he enters of record a cancellation of such mortgage, its lien is extinguished and it can not be revived to prevent the enforcement of an intervening mortgage of which they both had notice, but which they erroneously supposed the holder had abandoned. *Woodside v. Lippold*, 113 Ga. 877 (39 S. E. Rep. 400; 84 Am. St. Rep. 267). The general rule that the purchase at a tax sale of land by the mortgagee extinguishes the debt secured by the mortgage of the premises, does not extend so as to cause such a purchase to effect a satisfaction of a chattel mortgage given to secure the same debt and which has been assigned to a third party. *Powell v. Patrick*, 64 S. C. 190 (41 S. E. Rep. 894).

Sec. 233. Miscellaneous notes. The interest in a

lessee created by a stipulation in his lease giving him an option to purchase at any time after a specified period, and within the term, is neither a contingent remainder on a term of years, nor a fee limited on a fee, so as to come within the prohibition against estates of this character, contained in Cal. Civ. Code, §§ 773, 776. *Blakeman v. Miller*, 136 Cal. 138 (68 Pac. Rep. 587; 89 Am. St. Rep. 120). Under Burns' Ind. Rev. Stat., § 3379, a freehold estate may be created to commence at a future day. *Adams v. Alexander*, 159 Ind. 175 (64 N. E. Rep. 597). The statute of Pennsylvania (5 Smith's Laws, p. 395), expressly abolishing the right of survivorship as an incident of joint tenancy, does not forbid the creation by apt words of an estate in joint tenancy with the attribute of survivorship; and such an estate was held to have been created by a grant to four persons "as joint tenants and not tenants in common." *Redemptorist Fathers v. Lawler*, 205 Pa. St. 24 (54 Atl. Rep. 487).

ESTOPPEL.

EPITOME OF CASES.

Sec. 234. Estoppel by deed—General principles. A vendee who acquires possession under his contract is estopped to deny his vendor's title. *Coleman v. Stalnacke*, 15 S. Dak. 242 (88 N. W. Rep. 107). A grantor of land is estopped from claiming that he has no interest in the land at the time of his conveyance. *Van Husan v. Omaha Bridge & T. Ry. Co.*, 118 Ia. 366 (92 N. W. Rep. 47). The general rule that a party is estopped to question his own deed or to say that he had no title to convey, does not apply where the deed is obtained by fraud, or where the weak have been imposed upon by the strong. *Call v. Shewmaker*, (Ky.) 69 S. W. Rep. 749 (24 Ky. Law Rep. 1167). Where one without any title to land gives a mortgage thereon with the usual covenants, his subsequent grantee who assumes and agrees to pay the mortgage, but who gets nothing by his deed, may acquire the title of the true owner, and is not estopped to assert it against one claiming title

through a subsequent decree foreclosing the mortgage from the operation of which such title is excepted. *McLaughlin v. Betcher*, 87 Minn. 1 (91 N. W. Rep. 14). Where property is conveyed "subject to incumbrances" generally, no specific incumbrances being named, it will be presumed that valid and subsisting incumbrances are referred to, and the grantee will not be estopped by the mere words of conveyance from asserting the invalidity of an apparent lien existing at the date of the transfer. *Batty v. City of Hastings*, 63 Neb. 26 (88 N. W. Rep. 139).

Sec. 235. Title by estoppel—After-acquired title. A void execution sale will not be given validity so as to pass title, on the ground of estoppel, because the judgment creditor who was the purchaser credited the amount of the purchase on the judgment. *Briggs v. Murray*, Wash. (69 Pac. Rep. 765). See opinion for collation of authorities on the validating of void sales by estoppel in pais. A quitclaim deed will not estop the maker thereof from asserting an after-acquired title against his grantee. *Morrison v. Whiteside*, 116 Ga. 459 (42 S. E. Rep. 729). Construing and applying Miss. Code 1880, § 1235, providing that a quitclaim and release "shall estop the grantor and his heirs from asserting a subsequently acquired adverse title to the lands conveyed," it is held that the word "acquired" is used in the sense of obtained and included a title devolving on the grantor by descent. *Allen v. Leflore County*, Miss. (31 So. Rep. 815). A grantor who has conveyed by deed, with covenant of warranty, may acquire a new title adverse to that of his grantee by a subsequent entry and adverse possession, and is not estopped from asserting the same by his deed and covenant. *Horbach v. Boyd*, 64 Neb. 129 (89 N. W. Rep. 644). Citing, *Stearns v. Hendersass*, 9 Cush. 497 (57 Am. Dec. 65); *Sherman v. Kane*, 86 N. Y. 57; *Eddleman v. Carpenter*, 52 N. C. 616; *Hines v. Robinson*, 57 Me. 324 (99 Am. Dec. 772); *Cramer v. Benton*, 64 Barb. 522. A grantor's covenant of warranty in a deed conveying lands subject to a resulting trust in the hands of the grantee does not estop such grantor from afterward acquiring the interest of the cestui que trust. *Condit v. Bigalow*, 64 N. J. Eq. 504 (54 Atl. Rep. 160). S. Dak. Comp. Laws, § 3254, subd. 4, providing that "where a person purports by a proper instrument to grant real property in fee-simple, and subsequently acquires any title or claim of title thereto, the same passes by

operation of law to the grantee, or his successors," does not operate to estop a wife merely joining with her husband in a quitclaim deed of his premises from asserting title thereto subsequently acquired in her own right, although such deed recited that they convey all the right and title to the property. *State v. Kemmerer*, 15 S. Dak. 504 (90 N. W. Rep. 150). A covenant by a grantor in a deed to a mining claim "that it is intended hereby to convey any and all right, title, interest and estate which may hereafter be acquired to said premises, or any part thereof, by virtue of any patent which may hereafter be issued by the United States government therefor under the proceedings heretofore instituted in that behalf," does not estop the grantor from asserting title to the claim under a deed subsequently taken by him from one who has relocated the claim after the original grantee's forfeiture of the claim by failure to do the annual work required. *Mont. Comp. Stat. 1887, § 267* construed and applied. *McDermott Min. Co. v. McDermott*, 27 Mont. 143 (69 Pac. Rep. 715). Particular deed by a railroad company held to estop it from asserting an after-acquired title. *Garlick v. Pittsburgh & W. Ry. Co.*, 67 O. St. 239 (65 N. E. Rep. 896). *Mo. Rev. Stat. 1899, § 4591* construed and applied—conveyance of fee by one without title—inurement to grantee of after-acquired title. *Wilson v. Fisher*, 172 Mo. 10 (72 S. W. Rep. 665).

Sec. 236. Estoppel in pais—General principles and particular cases. The public right to the use and occupancy of a street may be lost by estoppel. *Corey v. City of Ft. Dodge*, 118 Ia. 742 (92 N. W. Rep. 704). See *Shirk v. City of Chicago*, 195 Ill. 298 (63 N. E. Rep. 193); *Blennerhassett v. Town of Forest City*, 117 Ia. 680 (91 N. W. Rep. 1044). Mere promissory representations or the expression of an opinion or belief can not be made the basis of an estoppel. *Marsh, Merwin & Lemmon v. City of Bridgeport*, 75 Conn. 495 (54 Atl. Rep. 196). To create an estoppel by representations they must have influenced the injured party to act. *Atkinson v. Plum*, 50 W. Va. 104 (40 S. E. Rep. 587; 58 L. R. A. 788); *Waggoner v. Dodson*, 96 Tex. 415 (73 S. W. Rep. 517). Acts committed by one while in ignorance of his rights can not form the basis of an estoppel in pais. *Briggs v. Murray*, Wash. (69 Pac. Rep. 765); *Cautley v. Morgan*, 51 W. Va. 304 (41 S. E. Rep. 201). An equitable estoppel can not arise where the facts are known by both parties, or both have the same means of

ascertaining the truth. *Crabtree v. Bank of Winchester*, 108 Tenn. 483 (67 S. W. Rep. 797); *Cautley v. Morgan*, 51 W. Va. 304 (41 S. E. Rep. 201). For a statement of the essential elements of an estoppel in pais, see *Atkinson v. Plum*, 50 W. Va. 104 (40 S. E. Rep. 587; 58 L. R. A. 788).

The fact that one has conveyed land adjacent to his premises with the understanding that a quarry was to be opened and operated thereon, does not estop him from subsequently maintaining an action for the negligent and unnecessary throwing of rocks and other debris from the quarry onto his premises. *Wilkins v. Monson Consol. Slate Co.*, 96 Me. 385 (52 Atl. Rep. 755). A copurchaser of realty is not estopped to ask for partition thereof on the ground that it was purchased under an agreement to organize a corporation and convey the property to it, where he did not at any time understand that the formation of the corporation, and the conveyance to it when formed, were conditions on which the purchase was made, or know that a corporation had been formed. *Page v. McMillan*, 114 Wis. 206 (90 N. W. Rep. 163). Where the holder of a mortgage on land, upon which a valuable nursery stock is afterward placed, expressly disclaims any interest in such stock when portions of it were afterward sold, and after foreclosure but before execution of deed, promised "that he would not claim those trees when he got his sheriff's deed," is estopped to claim them after the expiration of the period of redemption. *Wallace v. Dodd*, 136 Cal. 201 (68 Pac. Rep. 693). Tenants in common of an estate subject to ground rent, who by deed partition the same among themselves, leaving certain lots undivided, the rental of which it is recited in the deed is to be appropriated to the payment of the ground rent, as between themselves and all persons claiming under them thereby exonerated the remainder of the property from the ground rent, and some of their number subsequently purchasing the fee of the whole estate are estopped by the partition deed from asserting that any of the property except that specially appropriated thereto was subject to the ground rent. *Jones v. Rose*, 96 Md. 483 (54 Atl. Rep. 69).

Sec. 237. Estoppel in pais.—Accepting benefits. Where a party to a contract accepts it, acts under it, and obtains all of the benefits that were intended to be granted by it, he is estopped from objecting to the same on the ground that he did not sign it, as the law implies a promise on his part to per-

form the conditions of such contract, from his act of accepting it. *Lane v. Pacific & I. N. Ry. Co.*, Ida. (67 Pac. Rep. 656). A grantee accepting a deed of property belonging to a husband and wife reserving from their warranty a lease they have agreed to execute, is estopped to defend against a suit to enforce its execution, on the ground that such an agreement was signed by one acting as agent for the husband alone. *Boston Clothing Co. v. Solberg*, 28 Wash. 262 (68 Pac. Rep. 715). The acceptance by a grantee of a deed, in which he assumes payment of a mortgage on the property conveyed, does not estop him from maintaining an action against his grantor for fraudulent representations as to the amount due on such indebtedness. *Hutchinson v. Gorman*, Ark. (73 S. W. Rep. 793).

Sec. 238. Estoppel in pais—Silence. Silence will not estop, unless there is not only a right, but a duty, to speak. *Cautley v. Morgan*, 51 W. Va. 304 (41 S. E. Rep. 201). An adjoining property owner acquiescing in the erection and maintenance of coal bins by a railroad company may thereby create an estoppel against his abating them by injunction, but he does not lose his right to damages. *Louisville & N. R. Co. v. Walton*, (Ky.) 67 S. W. Rep. 988 (24 Ky. Law Rep. 9). Where one having title to land induces another to purchase it from one who has no title, he will not thereafter be permitted to assert his title to the detriment of the purchaser. *Amyx v. Hurt*, (Ky.) 68 S. W. Rep. 420 (24 Ky. Law Rep. 291). A judgment debtor is not estopped to recover his property sold on a void execution sale on account of his procuring an adjournment of the sale and remaining silent while the purchaser took possession, collected rents and mortgaged the same for a loan to pay the price and satisfy prior liens, all with his knowledge, it not appearing that the purchase or loan was induced by any positive acts or statements on the part of the owner, or that he knew at the time of those transactions that the execution sale was void. *Junior Order Bldg. & L. Ass'n v. Sharpe*, 63 N. J. Eq. 500 (52 Atl. Rep. 832). A judgment debtor who acquiesces in the sale of his real estate under the judgment to the judgment creditor for less than the face of the judgment and afterward procures the release of the judgment, represents to a subsequent purchaser that the judgment creditor has title and remains silent while such purchaser erects valuable improvements, pays incumbrances and taxes, is estopped after-

ward to question the validity of the sale under the judgment on account of a defect of the affidavit of the attorney in filing the transcript thereof in the court in which the sale was made. *Bulat v. Longrigan*, 63 N. J. Eq. 22 (50 Atl. Rep. 909).

Sec. 239. Estoppel in pais—Silence—Acquiescence in forged instrument. The failure of a wife for three years after her knowledge of the same to give notice that her release of dower in a conveyance of her husband's land is a forgery, will not estop her to assert the forgery against a subsequent innocent grantee for value, she having no knowledge that a conveyance was to be made to him. *Hunt v. Reilly*, 24 R. I. 68 (52 Atl. Rep. 681; 59 L. R. A. 206; 96 Am. St. Rep. 707). The court say: "The only remaining point is, does the possibility of sale make it fraudulent not to give some sort of notice? As we stated in the former opinion, we know of no notice that she was bound to give or that she could legally and effectively give, and we repeat what we said before,—that the respondents do not show what she should have done. They say it is not for them to show this. If they plead an estoppel, they must set up facts which constitute an estoppel. They have pleaded simply that she did not notify the original or subsequent grantees. Notice to the original grantee before he took the deed was impossible. Failure to notify him afterwards could work no estoppel, for in such a case an estoppel does not arise after the fact. Was it fraud not to give some sort of notice, if any effective notice could have been given? We can not say that it was. She had no present interest in the property. There was no certainty that she would outlive her husband, so as ever to have any interest. She had no knowledge that it was to be sold, as it has been, and to have acted with reference to it would have been action based upon conjecture. The elements of damage to others are too uncertain and remote to enable us to say that silence under such circumstances was fraud in law. As Judge French said in *Viele v. Judson*, 82 N. Y. 32: 'Are we not in danger of going so far as to say that, if a man patiently and silently bears a wrong, he shall be estopped from saying that it is a wrong? Suppose one's name is forged to a note, and he learn the fact that such paper is afloat. Of course, he understands that somebody may be deceived and injured by it. Must he bring an action against the forger or prosecute him criminally within a reasonable time, at the peril of being estopped from proving

the note a forgery when collection is sought to be enforced?' In *Williamson v. Jones*, 43 W. Va. 562 (27 S. E. Rep. 411; 38 L. R. A. 694; 64 Am. St. Rep. 891), another illustration is put: 'If one man chooses to go upon another's land and clear and improve it, the mere failure of the owner to go to him and warn him not to do so will not take away the true owner's title.' The inducement of another to act, and the omission to speak only when there is a duty to speak, with knowledge of the circumstances, are the recognized elements of estoppel. *Owen v. Slatter*, 26 Ala. 547 (62 Am. Dec. 745); *Lawrence v. Brown*, 5 N. Y. 394; 11 Am. & Eng. Enc. Law (2d Ed.) pp. 427, 428 and notes."

EVIDENCE.

EPITOME OF CASES.

Sec. 240. Admissibility of deeds and contracts. Before a sheriff's deed is admissible in evidence for the purpose of proving title thereunder, a valid judgment and execution must be shown whether such judgment emanated from a court of general or one of limited jurisdiction, and whether the party against whom the judgment was rendered be the party against whom it is offered or not. To the extent that the decision in *Hartley v. Ferrell*, 9 Fla. 374, conflicts with this rule, it is overruled. *Clem v. Meserole*, Fla. (32 So. Rep. 815). The mere fact that alterations or erasures or interlineations are apparent on the face of a deed does not destroy its validity, so as to render it inadmissible in evidence; but their effect is to be determined by extrinsic evidence. *Harper v. Reaves*, 132 Ala. 625 (32 So. Rep. 721). It is proper to admit in evidence a certified copy of a deed which has been of record more than thirty years, although not acknowledged as required by the law in force when it was executed. *Bradley v. Lightcap*, 201 Ill. 511 (66 N. E. Rep. 546). A written agreement between the vendor and vendee for the sale, purchase, and conveyance of land is not executed by and merged in the deed, as to the stipulations of the vendee therein concerning the consideration to be paid for the property; and such written agree-

ment is competent evidence to show the actual consideration. *Brumbaugh v. Chapman*, 45 O. St. 368 (13 N. E. Rep. 584), distinguished. *Conklin v. Hancock*, 67 O. St. 455 (66 N. E. Rep. 518).

Sec. 241. Admissibility of records and certified copies.

A certified copy of the record of an instrument not entitled to be recorded has no evidentiary value. *Crummey v. Bentley*, 114 Ga. 746 (40 S. E. Rep. 765). A certified copy of a plat on file or of record in a public office in a foreign state is not admissible in evidence in the courts of Kansas. Such plat must be produced and identified by the custodian thereof, and a copy therefrom proved by the oath of such custodian to be a true and correct copy of the original plat on file or of record in his office, before it will be received in evidence. *Munkres v. McCaskill*, 64 Kan. 516 (68 Pac. Rep. 42). Where there is no statute making a tract book and entries therein admissible in evidence, the admission of such evidence in an action to recover possession of land is error. See opinion for construction of Ala. Code 1896, § 962, 1812, 1813—admissibility of transcript of record. *Hammond v. Blue*, 132 Ala. 337 (31 So. Rep. 357). Where, in the recording of a will, certain words were omitted by the officer and he afterward corrected his record so as to conform to the original will, which was required by statute to remain in his office, in a subsequent action in which both the will and the record were used as evidence, the record as first made will not control, it not appearing that any of the parties had acted on or been misled to their injury by the wording of the will as it appeared on the records. *Hurd's Ill. Rev. Stat. 1901*, p. 1818, §§ 2, 18 construed and applied. *Brack v. Boyd*, 202 Ill. 440 (66 N. E. Rep. 1073). A statute (*Hurd's Ill. Rev. Stat. 1899*, p. 1288), providing that the execution of any instrument pleaded by a plaintiff in an action can not be denied by defendant except by verified plea, applies to a municipal corporation, and in an action on a written lease made with such a corporation, it is admissible in evidence without proof of its execution or of the authority of those executing it, there being no verified plea filed denying such execution. *City of Chicago v. Peck*, 196 Ill. 260 (63 N. E. Rep. 711). Construing and applying Ky. Stat., § 519, providing that "certified copies of all instruments legally recorded shall be prima facie evidence in all courts and trib-

umals of this state," it is held that a certified copy of a commissioner's deed legally recorded is admissible in evidence without proof of the judgment authorizing it. *Helton v. Belcher*, Ky. (70 S. W. Rep. 295; 24 Ky. Law Rep. 927). Construing and applying Mich. Pub. Laws, 1891, p. 131, it is held that the record of a deed recorded after the passage of the statute is prima facie evidence of the due execution of the deed, although it was executed prior to the statute, in a foreign state, and contained no certificate authenticating the officer's acknowledgment as then required. *Messenger v. Peter*, 129 Mich. 93 (88 N. W. Rep. 209). Mo. Rev. Stat. 1819, § 2428 construed and applied—sufficiency of proof to warrant introduction of copy of deed in evidence. *Orchard v. Collier*, 171 Mo. 390 (71 S. W. Rep. 677). W. Va. Code, ch. 130 construed and applied—attestation sufficient to authorize admission of copy of record of instrument in evidence. *Robinson v. Lowe*, 50 W. Va. 75 (40 S. E. Rep. 454). Wis. Rev. Stat., § 4156 construed and applied—admissibility of record of deed—necessity of showing that the certificate of acknowledgment bore the seal of the officer taking it. *Peters v. Reichenbach*, 114 Wis. 209 (90 N. W. Rep. 184).

Sec. 242. Parol evidence—Fixing boundaries—Construction of deeds—Proof of contents of lost deed. The principle of law permitting adjoining owners to fix the location of disputed lines by parol agreement proceeds upon the ground that the extent of the ownership of such proprietors, only may be so agreed upon and settled—not that title to land can be made to pass by parol agreements. It can not be extended to admit evidence of a verbal agreement to convey other premises than those described in a deed of conveyance. *Grubbs v. Boon*, 201 Ill. 98 (66 N. E. Rep. 390). A contract for the sale of land being signed by the vendor and by one as vendee, parol evidence is admissible to show that the latter signed as agent of an undisclosed principal and that the vendor afterward recognized such principal by accepting payments from her. *Brodhead v. Reinbold*, 200 Pa. St. 618 (50 Atl. Rep. 229; 86 Am. St. Rep. 735). When parol proof of the existence and contents of a lost deed is offered as the only evidence thereof, the witness must have seen and read it, and be able to speak pointedly and clearly as to its tenor and contents, and to state whether it conveys a fee simple, a life estate, or a term for years, and whether it in fact was executed by the supposed

grantor. *Dagley v. Black*, 197 Ill. 53 (64 N. E. Rep. 275). As to proof of lost deed, see *Thompson v. Flint & P. M. R. Co.*, 131 Mich. 95 (90 N. W. Rep. 1037).

Sec. 243. Parol evidence—Contemporaneous and collateral agreements. To contradict or vary the terms of a written contract by an oral contemporaneous agreement between the parties, there must be allegation as well as proof, not only of it, but of its omission through fraud, accident, or mistake from the writing. *Krueger v. Nicola*, 205 Pa. St. 38 (54 Atl. Rep. 494). A written contract of adoption of a child for a certain period of time, which does not give it the right to inherit from the persons adopting it, can not be varied by proof of a parol agreement of the adopting father before the execution of the instrument of adoption that, upon his death, he would make the child his heir. *Brantingham v. Huff*, 174 N. Y. 53 (66 N. E. Rep. 620; 95 Am. St. Rep. 545). Mont. Civ. Code, §§ 2186, 2281, 3122, construed and applied—parol evidence of contemporaneous agreements to change terms of written contract. *Armington v. Stelle*, 27 Mont. 13 (69 Pac. Rep. 115; 94 Am. St. Rep. 811).

Sec. 244. Parol evidence—Modification of covenants in deeds. In an action for breach of covenant against incumbrances in a warranty deed, parol evidence is admissible to show that the deed was executed on the express understanding between the parties that it should have no effect as a warranty. *Young v. Stampfer*, 27 Wash. 350 (67 Pac. Rep. 721). Parol evidence is not admissible to show a contemporaneous agreement between the parties to a deed that taxes were to be excepted from the operation of a covenant therein against incumbrances. *Stanisics v. McMurtry*, 64 Neb. 761 (90 N. W. Rep. 884). A grantee in a deed which recites that it is made subject to a certain mortgage can not show a contemporaneous parol agreement by his grantor to pay such mortgage, *Mott v. Rutter*, N. J. Eq. (54 Atl. Rep. 159); but in New Hampshire it is held that in an action on a covenant of warranty in a deed, based on the grantor's failure to pay taxes constituting an incumbrance within the covenant, a parol agreement by the grantee to pay such taxes, made before the execution of the deed, may be shown. *Gill v. Ferrin*, 71 N. H. 421 (52 Atl. Rep. 558). The court say: "The principle that parol evidence is not admissible to vary the terms of a covenant of

warranty—*Simanovick v. Wood*, 145 Mass. 180 (13 N. E. Rep. 391); *Flynn v. Bourneuf*, 143 Mass. 277 (9 N. E. Rep. 650; 58 Am. Rep. 135)—is not infringed when the evidence is used for the purpose of ascertaining the subject upon which the warranty was intended to operate. *Bartlett v. La Rochelle*, 68 N. H. 211 (44 Atl. Rep. 302); *Meredith Mechanic Ass'n v. American Twist Drill Co.*, 66 N. H. 267 (20 Atl. Rep. 330). A covenant against all incumbrances can not always be construed literally, without regard to the relations of the parties and the nature and situation of the property. Strictly, all land is incumbered with the right of the public to dispossess the owner of it at any time under the power of eminent domain; but such an incumbrance has never been regarded as covered by the ordinary covenants in a deed of land, for the reason that it was never supposed that the parties intended to make a contract of that unreasonable character.* In *Fitch v. Baldwin*, 17 Johns. 161, it was held that no action lies by a grantee for a breach of a covenant of seizin when he himself is seized of the premises. An invalid tax deed, though recorded, is not an incumbrance for which covenant lies. *Tibbetts v. Leeson*, 148 Mass. 102 (18 N. E. Rep. 679). When a tenant is in possession under a lease who attorns to the grantee 'it is of course impossible to call such a lease an incumbrance.' *Rawle, Cov.* (4th Ed.) 99. A legal highway in actual use has been held not to be embraced in a general covenant against incumbrances. *Scribner v. Holmes*, 16 Ind. 142; *Patterson v. Arthurs*, 9 Watts, 152; *Whitbeck v. Cook*, 15 Johns. 483, 491 (8 Am. Dec. 272). The existence of an easement which was apparent to the grantee when he received his deed was held not to be an incumbrance in *Janes v. Jenkins*, 34 Md. 1, (6 Am. Rep. 300). The court there say—page 11, 34 Md. (6 Am. Rep. 300): 'The grantor by his covenant warranted the premises as they were, and by no means intended to warrant against an existing easement which was open and visible to the appellant, and over which the former had no power or control whatever. To construe the covenant to embrace such subject would most likely defeat the understanding and intention of the parties; certainly, of the grantor.' Numerous other cases of claims upon or rights to the land conveyed, which have been determined not to be incumbrances, might be cited to show that the word 'incumbrance' is not ordinarily used in a deed in its broad, generic sense, but is qualified and limited by the apparent purposes of the parties. It becomes important, therefore, in such

cases to inquire, not merely whether there is in its broadest sense an incumbrance on the land, but, if a claim exists, whether it is such a claim as is included within the terms of the warranty, construed in the light of the attendant circumstances. To ascertain what those circumstances are, not to contradict the deed, parol evidence is admissible. *Manufacturing Co. v. Perley*, 46 N. H. 83, 108; *Swain v. Saltmarsh*, 54 N. H. 9, 16; *Crawford v. Parsons*, 63 N. H. 438, 443; *Davis v. George*, 67 N. H. 393, 395 (39 Atl. Rep. 979). 'The question, however, is not what the parties intended to do, but what did they do? What intention did they express in the deed? That is to be gathered from the words of the deed, read by the light thrown upon it by the condition of the subject-matter to which it applied.' *Ladd, J., in Pillsbury v. Elliott*, 56 N. H. 422, 425; *Fowler v. Kent*, 71 N. H. 388 (52 Atl. Rep. 554). In the present case the parties entered into a valid agreement by which Gill and Loveland were to have possession of the premises at an earlier date than had been provided in their first agreement, in consideration of which they agreed to pay the taxes assessed on the land for the current year. The terms of this agreement were severally performed by the parties, and when the deed was delivered the grantees' obligation to discharge the tax lien became absolute.

The parol promise to pay the tax was not within the statute of frauds. It was not a promise to a creditor to pay the debt of a third party, but a promise to the debtor to pay her debt or discharge her obligation upon a consideration moving from her. *Fiske v. McGregory*, 34 N. H. 414; *Hoysradt v. Holland*, 50 N. H. 433. If, upon the delivery of the deed, a tax lien existed upon the land, as is assumed by counsel on both sides, it thereupon ceased as between the parties, because that was the effect of their parol agreement; and its technical existence in favor of the public was not such an incumbrance as, upon a reasonable construction of the contract of warranty, under the circumstances, the defendant intended to assume, or the plaintiff's intended she should assume. *Brown v. Staples*, 28 Me. 497 (38 Am. Dec. 504); *Taylor v. Gilman*, 25 Vt. 411; *Reid v. Sycks*, 27 O. St. 285. The intention of the parties, and the true construction of the covenant, as disclosed by the circumstances under which it was made, are as apparent as they would have been if the parol agreement had been inserted in the deed, followed by the usual covenants of warranty against incumbrances. *Maup. Tit. 283.*"

Sec. 245. Declarations affecting realty interests.

Declarations of a party in possession are admissible to show the nature of his possession and under what title he claims, but not to sustain or destroy the record title. *Decker v. Decker*, 64 Neb. 239 (89 N. W. Rep. 795). Citing, *Dodge v. Trust Co.*, 93 U. S. 379 (23 L. Ed. 920). *Mooring v. McBride*, 62 Tex. 309; *Osgood v. Coates*, 1 Allen, 77; *Gilbert v. Odum*, 69 Tex. 670 (7 S. W. Rep. 510); *Morrill v. Titcomb*, 8 Allen, 100. Declarations of a grantee in possession of land that he had received it under an agreement to hold it for his life, it then to go to certain others, and that he paid nothing for it, and had declined to sell it because of this trust, are admissible against him and one claiming through a voluntary deed from him. *Ratliff v. Ratliff*, 131 N. C. 425 (42 S. E. Rep. 887). Declarations of a grantee in possession of land that he knew at the time that he purchased the same of an outstanding unrecorded mortgage, are admissible against him in favor of one asserting the priority of such mortgage. *Walter v. Brown*, 115 Ia. 360 (88 N. W. Rep. 832). Subsequent declarations of a grantee in a deed are admissible to show that at the time of its execution it was intended by the parties as a mortgage. *Harp v. Harp*, 136 Cal. 421 (69 Pac. Rep. 28).

Sec. 246. Declarations concerning boundaries.

The declaration of a deceased person is admissible to establish a corner tree which is not in view at the time of the declaration, but the position of which is described by the declarant so that it is found by a witness, although he is not the same person to whom the declaration was made. *Westfeldt v. Adams*, 131 N. C. 379 (42 S. E. Rep. 823). Declarations of deceased officers of a corporation concerning boundaries of real estate owned by it are not admissible in behalf of its grantee, in a suit with a third party involving the boundary, where they are not shown to have been made when the officers were discharging some duty in reference to such real estate. *Southern Iron Works v. Central of Georgia Ry. Co.*, 131 Ala. 649 (31 So. Rep. 723). In discussing the admissibility of declarations to establish boundaries, the supreme court of Alabama, in the case of *Bartlett v. Kelly*, 131 Ala. 378 (30 So. Rep. 824), say: "It is true that declarations of persons may be introduced in evidence for the purpose of showing ancient boundaries, but to render such evidence competent, and to bring it within the exception recognized, to free it from the objection of being hearsay, unless the

declarant is the owner and in possession at the time of making the declaration, such person must be shown to be dead, and shown to have had opportunities to know and prima facie that he had knowledge of that whereof he speaks, and to have been on the land at the time of making the declaration, or in possession of it when he made the declaration. 'To be evidence, they [the declarations] must have been made when the declarant was pointing out or marking the boundaries or discharging some duties thereto.' And we may add, as a further limitation, the declarant must have had no interest to misrepresent, and that the declaration must have been made ante litem motam. *Hunnicut v. Peyton*, 102 U. S. 364 (26 L. Ed. 119); *Payne v. Crawford*, 102 Ala. 387 (14 So. Rep. 854); 1 Greenl. Ev. (16th Ed.) §§ 131-140a."

Sec. 247. Presumption of grant from the state. A grant may be presumed against the state from facts and circumstances where the original grant can not be produced and there is no record thereof. See opinion for particular facts held sufficient to raise such presumption. *State v. Dickinson*, 129 Mich. 221 (88 N. W. Rep. 621). The court say: "The first question calling for consideration is, may a grant be presumed against the state from facts and circumstances where the original grant can not be produced, and where there is no record thereof? This question is answered in the affirmative in the following cases: *Archer v. Sadler*, 2 Hen. & M. 370; *People v. Rector*, etc., of Trinity Church, 22 N. Y. 44, and cases cited therein; *Fletcher v. Fuller*, 120 U. S. 534 (7 Sup. Ct. Rep. 667; 30 L. Ed. 759), and cases cited therein; *Fuller v. Fletcher*, (C. C.) 44 Fed. Rep. 34, and cases cited therein; *Roe v. Ireland*, 11 East, 280; *Stevenson's Heirs v. McReary*, 12 Smedes & M. 9 (51 Am. Dec. 102); *Grimes v. Corporation of Bastrop*, 26 Tex. 310. In *Tyler, Ej.* 568, it is said: 'Presumptions of grants of land often arise, but never unless the lapse of time be so great as to create a belief that such grants were actually made, or unless the case made shows that the party claiming the presumption was legally or equitably entitled to it. A conveyance will not, in general, be presumed, where the original enjoyment was consistent with the fact of there having been none. *Doe v. Reed*, 5 Barn. & Ald. 232. But where the plaintiff produced an original lease of the premises for a long term, and proved possession for 70 years, the mesne assignments were presumed (*Earle v. Baxter*, 2 W. Bl.

1228); and the jury were directed to presume that a grant regularly issued where a certificate of survey had been returned, and there were sundry conveyances of the land, and possession by persons claiming thereunder (*Thornton's Lessee v. Edwards*, 1 Har. & McH. 158). Presumptions of grants are founded upon the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They may be encountered by contrary presumptions, and can never fairly arise where all the circumstances are perfectly consistent with the nonexistence of a grant. *Jackson v. Mancius*, 2 Wend. 357. And, in general, the presumption of a grant is limited to periods analogous to those of the statute of limitations in cases where the statute does not apply. Where the statute applies, the presumption is not generally resorted to; but, if the circumstances of the case are very cogent, and require it, a grant may be presumed within a period short of the statute. *Ricard v. Williams*, 7 Wheat. 59 (5 L. Ed. 398). In the case of *Crane v. Reeder*, 21 Mich. 24 (4 Am. Rep. 430), the court discusses the question of whether the title in that case was affected by the lapse of time, and say: 'The doctrine of presumption of title from ancient grant is quite as inadmissible. If such a presumption can ever be allowed to dispute the accuracy of public acts and records, it cannot be permitted when there is in the case positive and unquestioned evidence showing that no title existed, or was ever set up, on behalf of Reeder, beyond the assumption of possession.' This statement indicates a decided difference between that case and the one at bar. It would also indicate that title from ancient grant might, in a proper case, be presumed. In *Steinhauser v. Kuhn*, 50 Mich. 367 (15 N. W. Rep. 513), in an opinion by Justice Campbell, it is held that, where one holds title under a series of deeds from persons in possession claiming title running back for a considerable period of time, the presumption of title from the government arises, subject to be rebutted. This decision was cited with approval in *Drake v. Happ*, 92 Mich. 580 (52 N. W. Rep. 1023)."

Sec. 248. Competency of witnesses—Statutes construed. Where the wife of one giving a mortgage for the purchase price of land, sets up as a defense to an action to foreclose it brought up by the executor of the mortgagee, an agreement by the latter, made at the time of the execution of the

mortgage, that the mortgage was to be hers after his death, the husband is not disqualified as a witness to prove such agreement, under N. Y. Code Civ. Proc., § 829, on account of his wife having derived her title from him, where he has previously withdrawn his answer to the action. *Bouton v. Welch*, 170 N. Y. 554 (63 N. E. Rep. 539). Construing and applying S. Dak. Laws 1901, ch. 105, § 1, providing that "in civil actions or proceedings by or against executors, administrators, heirs at law, or next of kin, in which judgment may be rendered or order entered, for or against them, neither party nor his assignor, nor any person who has or ever had any interest in the subject of the action adverse to the other party or to his testator or intestate, shall be allowed to testify against such other party as to any transaction whatever with, or statement by the testator or intestate, unless called to testify thereto by the opposite party," it is held that in an action to foreclose a mortgage against a deceased mortgagor, a witness who once had and may still have an interest in the subject of the action, is not disqualified from testifying that no action had been had for the recovery of the debt secured by the mortgage. *Alexander v. Ransom*, S. Dak. (92 N. W. Rep. 418). Citing, *Sharmer v. McIntosh*, 43 Neb. 509 (61 N. W. Rep. 727); *Clarey v. Smith*, 20 Kan. 83; *Adams v. Allen*, 44 Wis. 93; *In re Taylor's Estate (Appeal of Ruffell)*, 154 Pa. 183 (25 Atl. Rep. 1061; 18 L. R. A. 855); *Moore v. Wills*, 69 Tex. 109 (5 S. W. Rep. 670); *Britt v. Hall*, 116 Ia. 564 (90 N. W. Rep. 340). *Burns' Ind. Rev. Stat.*, § 506 construed and applied—proceedings in which executor or administrator is a party—competency of adverse party. *Goodwin v. Bentley*, 30 Ind. App. 477 (66 N. E. Rep. 496). Ia. Code, § 4604 construed and applied—competency of witnesses as to transaction with decedent. *Whisler v. Whisler*, 117 Ia. 712 (89 N. W. Rep. 1110); *Lowery v. Lowery*, 117 Ia. 704 (89 N. W. Rep. 1118); *Wickham v. Wickham*, Ia. (90 N. W. Rep. 527); *In re Wickham's Estate*, Ia. (90 N. W. Rep. 600); *Marshall v. Meyer*, Ia. (92 N. W. Rep. 693). *Bal. Ann. Wash. Codes & Stat.*, § 5991 construed and applied—competency of witnesses as to transaction with decedent. *Kline v. Stein*, 30 Wash. 189 (70 Pac. Rep. 235).

EXECUTION SALES.

EPITOME OF CASES.

Sec. 249. What real estate may be sold on execution. Construing and applying Ky. Civ. Code Prac., §§ 394, 399, 494, and Stat., §§ 1681, 1705, it is held that the interest acquired by a purchase of land at a commissioner's sale, before a commissioner's deed is executed, is not subject to sale under execution. *Goodin v. Wilson*, Ky. (71 S. W. Rep. 866; 24 Ky. Law Rep. 1521). Construing and applying Ky. Stat., § 1681, providing that "land to which the defendant has a legal title for life or for a term, whether in possession, reversion, or remainder, may be taken and sold under execution," and § 2355, providing that estates of every kind held in trust are made subject to the debts of the person for whose benefit they are so held, just as they would be if those persons owned a like interest in the property itself, it is held that the estate of a devisee in lands may be subjected to the claims of his creditors, notwithstanding a provision of the will restricting alienation by him until he arrived at a certain age. *Smith v. Smith*, Ky. (73 S. W. Rep. 1028; 24 Ky. Law. Rep. 2261). Ga. Civ. Code, §§ 5432, 5433 construed and applied—sale of land held under a title bond. *Black v. Gate City Coffin Co.*, 115 Ga. 15 (41 S. E. Rep. 259). Under Neb. Comp. Stat. 1901, ch. 16, § 53, lands appropriated and set apart as burial grounds, either for public or private use, and so recorded, are exempt from executions and forced sale, and they can not be reached by proceedings in the nature of a creditor's bill; and the fact that the owner of the legal title to a portion of the lots in such cemetery receives a portion of the revenues derived from a sale thereof when required for burial purposes does not render such unsold lots subject to execution, legal or equitable. *First Nat. Bank v. Hazel*, 63 Neb. 844 (89 N. W. Rep. 378; 56 L. R. A. 765).

Sec. 250. Issue, levy and return of execution. The

right of a judgment creditor to take out an execution on his judgment is a substantial right; and this right can only be taken away or suspended by some act, suit, or proceeding for this purpose in compliance with law. *Halmes v. Dovey*, 64 Neb. 122 (89 N. W. Rep. 631). Where the plaintiff in a judgment or decree for money dies, it is not necessary that a writ of scire facias to revive and have execution in the name of his personal representative against the defendant still living should make terre-tenants parties; and an award of execution upon a scire facias which keeps alive the judgment or decree on land as to the defendant will also keep the lien alive as to the terre-tenants, though not parties to the scire facias. *Maxwell v. Leeson*, 50 W. Va. 361 (40 S. E. Rep. 420; 88 Am. St. Rep. 875). For exhaustive collation of authorities on "Effect of the death of one of the parties after judgment, upon the remedy by execution," see 61 L. R. A. 353-392. Ala. Code, § 1883 construed and applied—statement of bill of costs on execution. *Griffin v. Dauphin*, 133 Ala. 543 (31 So. Rep. 849). Cal. Code Civ. Proc., § 685 construed and applied—issue of execution on leave of court after five years from date of judgment. *Wheeler v. Eldred*, 137 Cal. 37 (69 Pac. Rep. 619). An execution issued contrary to Ky. Stat., § 1656, providing that no execution shall issue to any other county than that in which the judgment was rendered or the defendant resides until execution has issued to one of these counties, and been returned. "No property found," may be set aside by the execution defendant; but until it is, it must be obeyed by the officer receiving it, and a sale made under it is not void. *Mitchell v. Fidelity Trust & Safety Vault Co.*, (Ky.) 67 S. W. Rep. 263 (24 Ky. Law Rep. 62). The provision in Mich. Comp. Laws 1897, § 9224, concerning the levy of execution, and which has no reference to attachments, that "the levy thus obtained, shall, from the filing of such notice, be valid against all prior grantees and mortgagees of whose claims the party interested shall not have actual or constructive notice," will not give an execution levied by an attaching creditor of a mortgagor after the recording of his mortgage precedence over it, by making it relate back to the levy of the attachment before the recording of the mortgage of which the creditor then had no knowledge. *Campbell v. Keys*, 130 Mich. 127 (89 N. W. Rep. 720). Mo. Rev. Stat., 1889, § 543 construed and applied—serving by officer of notice on tenant in possession, of levy of attachment—recital of such service on return. *Walter v. Scofield*, 167 Mo.

537 (67 S. W. Rep. 276). Shannon's Tenn. Code, §§ 4808-4810, 5892, subd. 8, construed and applied—issue of execution by justice of the peace. *Crabtree v. Bank of Winchester*, 108 Tenn. 483 (67 S. W. Rep. 797). In the absence of a statute authorizing it, the issuance of an execution on a judgment in a county other than that in which it was rendered, is without authority and a sale thereunder is void; and a statute (2 Bal. Ann. Wash. Codes & Stat., § 5132) authorizing a filing of a transcript of the judgment in such other county, and thereby making it a lien on the debtor's property in such county, does not change this rule. *Briggs v. Murray*, Wash. (69 Pac. Rep. 765). In support of the first proposition, the court cite: *Seaton v. Hamilton*, 10 Ia. 394; *Furman v. Dewell*, 35 Ia. 170; *Shattuck v. Cox*, 97 Ind. 242; *Bostwick v. Benedict*, 4 S. Dak. 414 (57 N. W. Rep. 78); *Freem. Ex'ns* (3d Ed.) § 14. Where the return of a writ of attachment recites a levy on land, and the service by the sheriff of a copy of the writ on a Chinaman, who is the sole occupant, and whose name is unknown to the sheriff, its failure to give the name of the Chinaman does not render void a judgment ordering a sale of the property. *White v. Ladd*, 41 Or. 324 (68 Pac. Rep. 739; 93 Am. St. Rep. 732).

Sec. 251. Sale in parcels or in solido. The sale of the whole of a farm divided into two distinct tracts by a public road will be set aside when it appears that if one of the tracts had been offered separately a sufficient sum would have been realized to satisfy the execution. *White v. Roberts*, 112 Ky. 788 (66 S. W. Rep. 758; 23 Ky. Law Rep. 2187). A sale in gross of an undivided interest in real estate, made to the attorney of the judgment creditor without demand for the payment of the execution from the landowner, for a very inadequate price, will be set aside, where the land was susceptible of division and the officer failed to offer it in lots or parcels, as required by Ill. Rev. Stat., ch. 77, § 12, and there is an inconsistency between the return of sale and the certificate as to the manner of offering the land for sale. *Miller v. McAlister*, 197 Ill. 72 (64 N. E. Rep. 254).

Sec. 252. Certificate of sale and sheriff's deed. Under Neb. Code Civ. Proc., § 500, a sheriff's deed is of itself *prima facie* evidence that the grantee holds all the title and interest in the land held by the judgment debtor at the time of the

rendition of the judgment, or at any time thereafter, up to the sale of the premises, and is prima facie evidence of the validity of the judgment itself. *Everson v. State*, Neb. (92 N. W. Rep. 137). *Starr & C. Ann. Ill. Stat.*, p. 2367, § 30 construed and applied—failure of purchaser to procure deed in five years. *Becker v. Friend*, 200 Ill. 75 (65 N. E. Rep. 683).

Sec. 253. Title and rights of purchaser. During the year of redemption a purchaser acquires no right to the possession of fixtures. *Off v. Finkelstein*, 200 Ill. 40 (65 N. E. Rep. 439). A purchaser at an attachment sale of a tract of land platted into blocks and lots by the owner, takes subject to his prior conveyances of lots in accordance with such plat. *Thompson v. Maloney*, 199 Ill. 276 (65 N. E. Rep. 236; 93 Am. St. Rep. 133). A purchaser at an execution sale has superior title to one claiming under a prior unrecorded deed by the execution defendant. *Central City Trust Co. v. Waco Bldg. Ass'n*, 95 Tex. 48 (64 S. W. Rep. 998). A purchaser of mortgaged lands on execution sale against the mortgagor acquires his interest therein, but the rights of the mortgagee are not affected. *Carrasco v. Mason*, N. H. (54 Atl. Rep. 1101). A purchaser of mortgaged lands at an execution sale thereof on a judgment inferior to the mortgage acquires all of the mortgagor's interest in the lands. *Hitch v. Bailey*, 115 Ga. 891 (42 S. E. Rep. 252). A purchaser at an execution sale may have his title quieted against a prior void foreclosure sale of the property to which his sale was not made subject. *Milliman v. Eddie*, 115 Ia. 530 (88 N. W. Rep. 964). The estate remaining in a grantor after a deed absolute intended as a mortgage is equitable only and does not pass to a purchaser at execution sale, under N. J. Gen. Stat., p. 2980, par. 7, this statute referring to legal estates only. *Williams v. Baker*, 62 N. J. Eq. 563 (51 Atl. Rep. 201). One purchasing at an execution sale land held by a devisee under a will which charges it with the support of another takes subject to such charge. *Steele v. Walter*, 204 Pa. St. 257 (53 Atl. Rep. 1097). Ky. Stat., §§ 1689, 1709, subd. 1, construed and applied—right of purchaser to possession—purchaser of incumbered land. *Wilson v. Flanders*, Ky. (71 S. W. Rep. 426; 24 Ky. Law Rep. 1302); *Read v. Cochran*, (Ky.) 71 S. W. Rep. 487 (24 Ky. Law Rep. 1412).

Sec. 254. Validity of sales—Setting aside. An exe-

cution sale of property in possession of a receiver, without leave of court, is contempt of court and will be set aside. *Campau v. Detroit Driving Club*, 130 Mich. 417 (90 N. W. Rep. 49). An execution sale of homestead premises is void at law if the homestead is not properly set off according to the statute, and in an action of ejectment a recovery can not be had of the portion of the premises sold which is in excess of the homestead. *Palmer v. Riddle*, 197 Ill. 45 (64 N. E. Rep. 263). An execution sale is not rendered void by reason of the fact that the execution under which it is made was directed to the sheriff of the wrong county, where it was in fact delivered to, and received and executed by, the proper officer. *Christy v. Springs*, 11 Okla. 710 (69 Pac. Rep. 864). The failure of an officer making a sale under execution to satisfy it first out of the debtor's personal property, as required by *Ariz. Laws*, 1889, act. No. 20, does not invalidate a sale of his real estate, especially when made to an innocent purchaser, where the debtor failed to call the officer's attention to his personal property and require him to satisfy the execution out of it. *Oliver v. Dougherty*, *Ariz.* (68 Pac. Rep. 553). A sale of property on an execution for the full amount of a judgment for \$6,000, taken out by an attorney of the judgment plaintiff after the judgment had all been paid except costs of less than \$100, is invalid. *Baird v. Given*, 170 Mo. 302 (70 S. W. Rep. 697).

Sec. 255. Validity of sales—Purchase by attorney of plaintiff. Without proof of unfairness, a sale can not be attacked by an execution defendant on account of purchase having been made by the attorney for the plaintiff in the writ, with the latter's consent. *Douglass v. Blount*, 95 Tex. 369 (67 S. W. Rep. 484; 58 L. R. A. 699). The court concludes an exhaustive review of the cases on this subject by saying: "We have found no case in which, at the instance of the defendant, it has been held that a sale of land under judicial process was void because the purchaser was attorney for the plaintiff in a writ, unless the circumstances impeached the fairness of the transaction. It is a well-settled rule of law that an attorney can not, for himself, buy property exposed to sale by process under his control without the consent of his client, unless he bids sufficient amount to discharge the judgment debt. This rule has been rigidly enforced by the courts, and should not be relaxed, for the delicate relation of trust between attorney and client should not be imperiled by the intrusion of the selfish

interest of the trustee. The authorities justify the conclusion that when an attorney purchases property at a sale under process controlled by him, without circumstances impeaching the transaction, and when the client consents to the purchase, or the attorney bids sufficient at the sale to discharge the judgment, such sale will be held good against any claim of the defendant in the writ. *Le Conte v. Irwin*, 19 S. C. 559; *Cavender v. Smith's Heirs*, 1 Ia. 306; *Grayson v. Weddle*, 63 Mo. 539; *Hess v. Voss*, 52 Ill. 481; *Relf v. Ives*, 10 La. 509; *Hyams v. Herndon*, 36 La. Ann. 879."

EXECUTORS AND ADMINISTRATORS.

EPITOME OF CASES.

Sec. 256. Power to mortgage—Rights as to decedent's realty. In Alabama it is held that the statutory authority given executors and administrators to rent the lands of a decedent, does not give them power to enter into a contract to mortgage all the crops grown on the estate to pay a mortgage on the land given by their intestate, and future advances to be made by the mortgagee to assist in raising the crops. *Jones v. Peebles*, 133 Ala. 290 (32 So. Rep. 60). Oregon Laws 1898, p. 34 construed and applied—execution of mortgages by executors and administrators. *Lawrey v. Sterling*, 69 Or. 518 (69 Pac. Rep. 460). Upon the death of a vendor his interest in land held by a vendee under a contract of purchase is personalty and passes to his administrator as such. *Bowen v. Lansing*, 129 Mich. 117 (88 N. W. Rep. 384; 57 L. R. A. 643; 95 Am. St. Rep. 427). See opinion for review of authorities on this subject. Where the statute does not give an administrator a right to the possession of the real estate, neither he nor his bondsmen are liable for the rents or profits. *Russell v. Wheeler*, 129 Mich. 41 (88 N. W. Rep. 73). An administrator appointed pending proceedings to contest a will, under Mo. Rev. Stat. 1899, § 13, has no right to possession of the real estate owned by decedent at the time of his death, unless the probate court so orders, or the property is needed to pay debts. *Union Trust Co. v. Sorderer*, 171 Mo. 675 (72

S. W. Rep. 499). Construing and applying Mo. Rev. Stat., §§ 100, 101, 131, it is held that in the absence of a showing that the personal estate of an intestate is insufficient to pay his debts, orders of the court directing an administrator to complete buildings commenced by the intestate in his lifetime, and to take charge of the intestate's improved real estate, and to insure the buildings thereon, are void. *Langston v. Canterbury*, 173 Mo. 122 (73 S. W. Rep. 151).

Sec. 257. Suits by and against. Statutes (Cal. Code Civ. Proc., §§ 1452, 1581, 1582) giving an administrator power to sue to recover realty, quiet title or determine adverse claims thereon, authorize him to maintain a suit to cancel his decedent's deed procured by the fraud or undue influence of the grantees. *London & San Francisco Bank v. Curtis*, 27 Wash. 656 (68 Pac. Rep. 329). N. J. Pub. Laws 1898, p. 738, § 65, prohibiting the bringing of actions against executors or administrators for a period of six months after their appointment, does not apply to an action to foreclose a mortgage. *Ayres v. Shepherd*, 64 N. J. Eq. 166 (53 Atl. Rep. 690).

Sec. 258. Sales to pay debts. The right to sell a decedent's realty in discharge of his debts is of statutory origin, and statutes of this character can not be given an extra-territorial operation. Md. Code, art. 16, § 188 construed and applied. *Seldner v. Katz*, 96 Md. 212 (53 Atl. Rep. 931). The existence of taxes against the real estate of a decedent, which are not yet due, do not constitute such a debt as alone will authorize a suit by his administrator to subject the real estate to the payment thereof. *Holburn v. Pfanmiller's Adm'r*, Ky. (71 S. W. Rep. 940; 24 Ky. Law Rep. 1613).

Where one to whom an owner of land gives an option to purchase it for a given period exercises the option within the time named, but after the death of the owner, and the heirs of the latter refuse to perform the contract, the right of one holding the option to recover damages does not constitute him a creditor of the deceased owner so as to permit him to have a sale of the latter's real estate, under Md. Code, Supp., art. 16, § 188, to pay such claim. *McGaw v. Gortner*, 96 Md. 489 (54 Atl. Rep. 133). Because litigation is pending involving the title to one of several parcels of real estate for which license is prayed by an administrator to sell for the purpose of paying debts owing by the estate, that fact will not render erroneous an

order, otherwise proper, granting a license to sell such real estate for the purpose mentioned. *Martin v. Bond's Estate*, 64 Neb. 868 (90 N. W. Rep. 910). In Alabama it is held that the decree of the probate court ordering the sale of decedent's lands for the payment of debts upon petition of the administrator is not *res adjudicata* as to the validity of the debts and the insufficiency of the personal property to pay them, as against the decedent's heirs or their successors in interest; and does not bar them from subsequently asserting that such debts were barred by the statute of limitations at the time of the decree. *State v. Williams*, 131 Ala. 56 (30 So. Rep. 782; 90 Am. St. Rep. 17). The rule in Missouri that an administrator, as to the acts of his intestate, stands in his shoes, and can not assail his deed for fraud, even though it be to recover assets to pay creditors of the estate, does not go to the extent of preventing his making of a sale of lands fraudulently conveyed by his decedent, to pay his debts, after such conveyance has been set aside by creditors. *St. Francis Mill Co. v. Sugg*, 169 Mo. 130 (69 S. W. Rep. 359). A delay of seven years to make application for the sale of lands by an administrator to pay debts is an unreasonable delay that will bar the application unless some reasonable excuse be shown for the delay. *Black v. Robinson*, 70 Ark. 185 (68 S. W. Rep. 489). 2 Bal. Ann. Wash. Codes & Stat., § 6190 construed and applied—authority of partnership administrators to sell real estate. *State v. Neal*, 29 Wash. 391 (69 Pac. Rep. 1103).

Sec. 259. Sales to pay debts—Parties, pleading and practice. An order for the sale of a reversion in realty after the expiration of a widow's dower constitutes authority to sell the fee where she dies before the sale takes place. *Adams v. Adams*, 113 Ga. 824 (39 S. E. Rep. 291). A creditor of an estate can not intervene as party plaintiff in proceedings by the executor to sell testator's real estate to pay debts; and a sale made on proceedings prosecuted by a creditor who has so intervened is invalid. *Strickland v. Strickland*, 129 N. C. 84 (39 S. E. Rep. 735). Cal. Code Civ. Proc., § 1537 construed and applied—requisites of petition to sell. In *re Cook's Estate*, 137 Cal. 184 (69 Pac. Rep. 968). *Burns' Ind. Rev. Stat.*, § 2512 construed and applied—time of return by administrator of his proceedings on order to sell real estate. *Custer v. Holler*, 160 Ind. 505 (67 N. E. Rep. 228). Under Kan. Gen. Stat. 1901, § 2919 it is held that when an adminis-

trator ascertains that the personal property of his decedent will not be sufficient to pay the debts, he may petition for a sale of realty without waiting until such debts are established and allowed against the estate. *Randel v. Randel*, 64 Kan. 254 (67 Pac. Rep. 837). An application to a district court by an executor or administrator for license to sell real property is not an "action in equity," within the purview of Neb. Code Civ. Proc., § 675, providing that appeals may be brought to the supreme court by "either party" in "all actions in equity." *In re Entenmann's Estate*, 64 Neb. 409 (89 N. W. Rep. 1033). Under N. J. Laws 1898, p. 715, § 85, an orphans' court to which an administrator's or executor's sale is reported for confirmation should withhold confirmation, and order a resale, if the bid reported is far below the estimated value of the property, and the property was not offered for sale in a manner which, in view of all the known circumstances, seemed likely to bring the best price. *Ryan v. Wilson*, 64 N. J. Eq. 797 (53 Atl. Rep. 1039). Under Pa. Laws 1834, p. 80, § 34 the widow and heirs of a decedent are not deprived of their title to his lands by a sale on execution under a judgment against his administrator procured by a creditor without making them parties. *McCormick v. Skelly*, 201 Pa. St. 184 (50 Atl. Rep. 765). A petition by an administrator to mortgage his decedent's real estate, filed under 2 Bal. Ann. Wash. Codes & Stat., § 6257 which alleges that the administrator had sold "all the personal property that, in his judgment, is advisable to sell," is insufficient, because it affirmatively shows that the personal estate has not been exhausted. *Wallace v. Grant*, 27 Wash. 130 (67 Pac. Rep. 578). For cases determining the sufficiency of particular petitions to sell, see *Dauel v. Arnold*, 202 Ill. 570 (66 N. E. Rep. 846); *Poole v. Daughdrill*, 129 Ala. 208 (30 So. Rep. 579), applying Ala. Code, § 158.

Sec. 260. Sales to pay debts—Title and rights of purchaser. The rule of caveat emptor applies to sales by executors and administrators. *Keen v. McAfee*, 116 Ga. 728 (42 S. E. Rep. 1022). An administrator's sale upon order of court is a judicial sale to which the rule of caveat emptor applies, and the purchaser can not defend an action at law for the purchase money because of misrepresentations of the administrator while acting as agent of the court in making the sale. *Culli v. House*, 133 Ala. 304 (32 So. Rep. 254). To show title

under an administrator's deed in Georgia, even as against one claiming to hold under such administrator's intestate, an order of the ordinary granting the administrator leave to sell such real estate must be shown. *Waller v. Hogan*, 114 Ga. 383 (40 S. E. Rep. 254).

Sec. 261. Validity of sales—Setting aside—Collateral attack. A judicial sale of the lands of a deceased person to pay his debts is void, as to infant heirs, where more land is sold than is necessary to pay the debts of the ancestor, unless the property is indivisible. *Louisville Banking Co. v. Pranger*, (Ky.) 68 S. W. Rep. 632 (24 Ky. Law Rep. 408). A mere crier, employed by an administrator, does not control the sale, but is simply the mouthpiece of the latter, and can not, over his protest, complete the sale; certainly when there are present one or more persons willing to bid higher if allowed an opportunity to do so. *Scales v. Chambers*, 113 Ga. 920 (39 S. E. Rep. 396). Heirs of a decedent whose estate has long been pending in court can not have an order for the sale of his real estate set aside on the ground of their having no knowledge of the filing of the petition therefor, under Cal. Code Civ. Proc., § 473, providing that the court may relieve a party "from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect." *In re Leonis' Estate*, 138 Cal. 194 (71 Pac. Rep. 171). Cal. Code Civ. Proc., § 1552 construed and applied—vacation and resale when "proceedings were unfair" or the sum bid "disproportionate to the value." *In re Leonis' Estate*, 138 Cal. 194 (71 Pac. Rep. 171). An administrator's sale will not be held invalid on a collateral attack for any mere irregularity in the statements in the petition as to the indebtedness, where it states the aggregate amount of the debts; or because the court failed to order the administrator to give the additional bond required by Ill. Rev. Stat., ch. 3, § 7, it appearing that the lands had been sold on the order of the court and the proceeds applied to the payment of the debts. *Frothingham v. Petty*, 197 Ill. 418 (64 N. E. Rep. 270). One who was a party to proceedings by an administrator to sell real estate, and answered by a guardian ad litem, will not be permitted in a collateral proceeding to take advantage of mere errors in the original proceeding. *Frothingham v. Petty*, 197 Ill. 418 (64 N. E. Rep. 270).

Sec. 262. Purchase by executor or administrator. A purchase by an administrator, of any interest in the property, renders the entire sale voidable at the instance of any one interested in the estate who moves within a reasonable time to set aside the sale; but where the law recognized his wife as a separate and distinct person, a deed made by an administrator so purchasing conveying the property to his wife for a valuable consideration vests the title in her, if she had no knowledge of the manner in which he acquired his title. *Moore v. Carey*, 116 Ga. 28 (42 S. E. Rep. 258). An executor or administrator, who is a judgment creditor of his decedent and has an execution lien, has such an interest in the property of the decedent as entitles him to become a purchaser at a sale thereof for the payment of debts, provided there is no unfairness, and the property is exposed to sale in the ordinary mode, and under such circumstances as will command the best price. *Cottingham v. Moore*, 129 Ala. 209 (30 So. Rep. 784). An administrator who purchases property at his own sale must take all the legitimate consequences of an election by heirs, duly made, to set the sale aside; and the right to exercise such election can not be defeated because of the insolvency of the estate, or because on a resale the property would bring less than the first sale, or because the administrator, in good faith believing that the sale to himself would be allowed to stand, used his own money in discharging indebtedness due by the estate. *Pirkle v. Cooper*, 113 Ga. 828 (39 S. E. Rep. 289).

Sec. 263. Right of executor to withdraw property after he has offered it for sale and bids have been made. An executor offering land for sale at public outcry has the right to withdraw the same at any time before the hammer falls; and where such a withdrawal is made after bids have been received, the highest bidder in such a case does not acquire any right, by reason of his bid, to compel the executor to accept the same and make him a deed upon tender of the amount so bid; nor can he inquire into the motive of the executor in withdrawing the property. *Tillman v. Dunman*, 114 Ga. 406 (40 S. E. Rep. 244; 57 L. R. A. 784; 88 Am. St. Rep. 28). The court say: "In *Paine v. Cave*, 3 Term R. 148, the principle underlying this rule is thus stated: 'The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract. That is signified on the part of the seller by knocking down the hammer. * * * Every

bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to.' For the same reason the seller has the right to withdraw the property before it is knocked off to the bidder. Mr. Story, in his treatise on the Law of Sales (section 461), states the rule thus: 'In a sale by auction the seller may withdraw the goods, or the bidder may retract his bid, at any time before they are knocked off; for, so long as the final consent of both parties is not signified by the blow of the hammer, there were only mutual propositions, but no mutual agreement to one definite proposition.' See 2 Kent, Comm. (4th Ed.) *537; *Corryolles v. Mossy*, 2 La. 504. But it is claimed that this rule of auction sales does not apply to sales by administrators and executors, as they are regulated by statute, which must be strictly complied with, and, while such representatives are vested with large discretion, they can not lawfully withdraw property when it has been exposed for sale after due advertisement. There is a close resemblance between an executor or administrator's sale, when made under an order of court, to one made under an execution or decree, or other compulsory process; but, where the sale is made under a power contained in the will, the executor's sale more nearly resembles that of an individual offering his property for sale. But granting, for the sake of the argument, that the sale in question rested upon the same footing with judicial sales, we find that it has been determined that an officer of court has a right to withdraw property, even when offered for sale under compulsory process, and bids have been received and cried, and that the bidder at such a sale acquires no right to compel the officer to convey the property, even where his bid is the best and highest, unless the property is knocked off to him, or the hammer falls, and the sale is thus completed. Mr. Freeman, in his work on Executions (volume 2, § 288, p. 1665), says, on authority: 'Officers charged with the duty of conducting chancery, trustee, and other involuntary sales have also a discretion to withdraw the property after being offered for sale.' In the case of *Miller v. Law*, 10 Rich. Eq. 320 (73 Am. Dec. 92), it was ruled that: 'The commissioner has a discretion, subject to the control of the court, to withdraw land from sale after it has been offered, and even after a bid has been received and cried. If he does so, the highest bidder is not entitled to a conveyance, there being no contract with him.' It was ruled by the supreme court of the United States in the case of *Blossom v. Railroad Co.*, 3 Wall. 196 (18 L. Ed. 43), that 'a

bidder at a judicial sale at public auction, whose bid has not been accepted, * * * can not insist, even though he has been the highest and best bidder, on leave to pay the amount of his bid, and have a confirmation of the sale made to him.' Mr. Justice Clifford, in delivering the opinion of the court in that case, after stating the rule above quoted from Story on the Law of Sales, says: 'The same rules prevail upon a sale under a common-law process as in other cases of sales at public auction.' From the foregoing authorities it seems to be well settled that on principle, as well as by well-considered adjudications, the officer offering property at a judicial sale, except where his discretion is controlled by the order of sale, can withdraw the property offered for sale before the same is knocked off, and that a bidder at judicial sales acquires no right to compel a conveyance of the property offered until the same has been knocked off to him. See, also, in this connection, *Scales v. Chambers*, 113 Ga. 920 (39 S. E. Rep. 396). It would therefore seem that, even if the rule governing judicial sales is to be applied to the sale by the executors in the present case, they had the right to withdraw the property offered from sale, and that Tillman, by reason of being the highest and best bidder at such sale, acquired no right to compel a conveyance by the executors, as the property was withdrawn before the same was knocked off to him by the auctioneer, for the reason that there was no acceptance of his offer and no contract."

FENCES.

EPITOME OF CASES.

Sec. 264. Definition of a "fence"—"Hedge" as a fence—Ownership of partition fence. A "hedge" is held not to be a fence, within the meaning of Tex. Rev. Stat., §§ 2501, 2502, giving the owner or part owner of a fence connected with the fence of another the right to separate it by giving six months notice. *Brown v. Johnson*, Tex. Civ. App. (73 S. W. Rep. 49). The court say: "The terms of those statutes are not as clear as might be desired, but we are of the opinion

that the word 'fence,' as used in the statute, has no reference to, and does not include within its meaning, a hedge. The common and usually accepted meaning of the word 'fence' is an inclosing structure of wood, iron, or other material, and such definition must have been in the mind of the legislature when the articles in question were enacted. Where two persons are the joint owners of a fence, their interests might be separated and partitioned without material injury to either; but not so with a hedge, which necessarily consists of growing trees, vines, or shrubs, unless one party owned a certain portion of it, and the other party the other part." That part of a partition fence assigned by fence viewers to one owner to keep in repair is his property so far as to authorize him to remove it for the purpose of replacing it with another fence of a different kind. *Ropes v. Flint*, 182 Mass. 473 (65 N. E. Rep. 812).

Sec. 265. Constitutionality of statute declaring fence maliciously erected a nuisance and giving a right of action for damages. A statute (N. H. Pub. Stat., 1901, ch. 143, §§ 28-30) declaring that "any fence or other structure in the nature of a fence, unnecessarily exceeding five feet in height, erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance," and providing that one injured thereby may have an action for damages, is not unconstitutional as an invasion of the right of private property. *Horan v. Byrnes*, N. H. (54 Atl. Rep. 945; 62 L. R. A. 602). The court say: "The statute was designed to prevent an act the sole effect of which would be to annoy or injure another." *Lovell v. Noyes*, 69 N. H. 263 (46 Atl. Rep. 25). The primary question, therefore, is whether one's right to use property solely to injure another is a part of his property right in real estate, which is so protected by the constitution that the prohibition of such use is not within the general power of legislation 'for the benefit and welfare of this state and for the governing and ordering thereof.' Const., art. 5. Upon the question whether a fence on or near the division line between adjoining landowners, maliciously built to an unreasonable height for the sole purpose of annoying and injuring the adjoining owner or occupant, is a nuisance which can, in the absence of statutory authority, be abated by an injunction, the courts are in conflict. *Letts v. Kessler*, 54 O. St. 73 (42 N. E. Rep. 765; 40 L. R. A. 177), answers the question in the negative, while an

opposite conclusion is reached in Michigan. *Burke v. Smith*, 69 Mich. 380 (37 N. W. Rep. 838); *Flaherty v. Moran*, 81 Mich. 52 (45 N. W. Rep. 381; 8 L. R. A. 183; 21 Am. St. Rep. 510); *Kirkwood v. Finegan*, 95 Mich. 543 (55 N. W. Rep. 457). In *Rideout v. Knox*, 148 Mass. 368 (19 N. E. Rep. 390; 2 L. R. A. 81; 12 Am. St. Rep. 560), and *Karasek v. Peier*, 22 Wash. 419 (61 Pac. Rep. 33; 50 L. R. A. 345), cases in which the power of the Legislature to enact a statute similar to that under consideration is attacked and upheld, it is conceded 'that to a large extent the power to use one's property malevolently in any way which would be lawful for other ends is an incident of property which can not be taken away even by legislation.' *Rideout v. Knox*, 148 Mass. 372 (19 N. E. Rep. 392; 2 L. R. A. 81; 12 Am. St. Rep. 560)."

Sec. 266. Fencing railroads—Statutes construed. In order for one owning land abutting on a railroad right of way to recover from the railroad company, under *Burns' Ind. Rev. Stat.*, §§ 5323, 5324, for the construction of a fence, it must be placed as near as practicable to the line between the right of way and the abutting owner. *Chicago & S. E. Ry. Co. v. Wood*, 30 Ind. App. 650 (66 N. E. Rep. 923). A statute (*Burns' Ind. Rev. Stat.*, §§ 5323-5325) providing that railway companies must fence their tracks where they can be fenced, specifying the kind of fence required, and, upon their neglect or failure to do so, giving the owner of the real estate along the right of way the right, after thirty days notice of his intention to do so, to build or repair the same, and collect the expense thereof, including material and labor, together with reasonable attorney's fees, is constitutional as a valid exercise of the police power; and the provision as to the allowance of attorney's fees is not unconstitutional, as depriving the railroad company of its property without due process of law. *Terre Haute & L. Ry. Co. v. Salmon*, 161 Ind. 131 (67 N. E. Rep. 918). See opinion for exhaustive collation of authorities on both propositions.

Sec. 267. Fencing railroads—Farm crossings, cattle guards, etc. A railroad company may have an injunction against a landowner who persistently leaves open, injures and destroys gates at farm crossings on its right of way, erected for the benefit of such owner's premises, although they are heavy and unsuitable. *Axthelm v. Chicago, R. I. & P. R. Co.*, (Neb.) 89 N. W. Rep. 313. Citing *Truesdale v. Jensen*, 91 Ia. 312 (59

N. W. Rep. 47). *Sand. & H. Ark. Dig.*, §§ 6238, 6239 construed and applied—notice by landowner to railroad to construct cattle guards—sufficiency and proof of service. *St. Louis, I. M. & S. Ry. Co. v. Mendenhall*, Ark. (71 S. W. Rep. 269). Ky. Stat., § 1793 construed and applied—duties of railroad as to erection of cattle guards. *Payton v. Louisville & N. R. Co.*, Ky. (72 S. W. Rep. 346; 24 Ky. Law Rep. 1896). The owner of a small tract of land within the limits of a city bordering on a railroad within such limits, who buys another small tract outside the city limits and on the opposite side of such railway, can not claim the benefit of a statute (Mo. Rev. Stat., § 1105) requiring railroads to fence and provide farm crossings where the road runs through cultivated lands. *Smith v. Missouri, K. & T. Ry. Co.*, 94 Mo. App. 398 (68 S. W. Rep. 238). S. C. Rev. Stat. 1893, §§ 1729, 1730 construed and applied—duty of railroad to erect cattle guards where “line of railroad crosses a line fence.” *Burnett v. Southern Ry. Co.* 62 S. C. 281 (40 S. E. Rep. 679). Tex. Rev. Stat., art. 4427, providing that the owner of inclosed land crossed by a railroad may require the railroad, at its own expense, to make openings or crossings in its fences, has no application where the right of way was acquired and fenced by the railroad company prior to the enactment of the statute, and in such cases the railroad company can not be required to construct and maintain such crossing at its own expense. *Owazarzak v. Gulf, C. & S. F. Ry. Co.*, 31 Tex. Civ. App. 229 (71 S. W. Rep. 793).

FIXTURES.

EPITOME OF CASES.

Sec. 268. Personal property attached to real estate—Effect of contract reserving title or chattel mortgage on the personal property. Where machinery is purchased for use in a permanent building under a contract that the machinery shall remain the property of the seller, or where, after such machinery is placed in such building, a chattel mortgage is given by the purchaser to the seller upon such machinery a

real estate mortgage of prior date to the purchase of such machinery is not a lien upon such machinery, and the mortgagee has the right to foreclose his chattel mortgage. *Anderson v. Creamery Package Mfg. Co.* Ida. (67 Pac. Rep. 493; 56 L. R. A. 554). The reservation of title to machinery placed in a building accompanied with the fact that it can be easily removed without material injury to either shows an intention that the property shall remain personalty, which will prevent it from becoming a part of the realty. *Schellenberg v. Detroit Heating & Lighting Co.*, 130 Mich. 439 (90 N. W. Rep. 47; 57 L. R. A. 632). W. Va. Code, ch. 74, § 3, requiring notice of a reservation of title to goods and chattels sold upon condition precedent to be recorded in the clerk's office of the county court of the county where the property is, does not apply unless possession of the property be delivered to the buyer. When the property so sold is a structure upon the real estate of the vendor, capable in its nature of being made a fixture, and it is agreed between the parties that it shall not be removed until paid for, there is no delivery of possession, although the buyer, as tenant or licensee upon the land, has the use of such property. *Webster Lumber Co. v. Keystone Lumber Co.*, 51 W. Va. 545 (42 S. E. Rep. 632).

Sec. 269. What constitutes a fixture—Buildings and appliances connected therewith. A hotel building, affixed to land, and held and conveyed with the land upon which it stands as real estate, can not thereafter, by mere agreement of the parties, become a chattel or personal property, and legally incumbered by a chattel mortgage, until after its severance from the land. *Beeler v. C. C. Mercantile Co.*, Ida. (70 Pac. Rep. 943; 60 L. R. A. 283). A blacksmith shop moved onto a farm by a lessee by means of two poles or runners attached to the bottom of the shop, and which was brought on the farm to be used temporarily, and remained resting on the runners by means of which it had been moved to the farm, and was removed by dragging it away on the runners, was held not to have become a fixture. *Smyth v. Stoddard*, 203 Ill. 424 (67 N. E. Rep. 980; 90 Am. St. Rep. 314). Although recognizing it to be contrary to the weight of authority and not free from criticism by its own decisions, the supreme court of Maine adheres to the rule established in that state that a building erected by one on the land of another under an agreement that it shall remain the personal property of the builder does not pass by a

conveyance of the land to a bona fide purchaser, without notice, although from its character, purpose, and mode of use it appears to be a part of the realty. *Peaks v. Hutchinson*, 96 Me. 530 (53 Atl. Rep. 38; 59 Atl. Rep. 279). Water pipes laid in the proposed streets in lands platted as a prospective addition to a city, by the owner thereof who, at the time owned all the stock in a waterworks company, having a system of waterworks with which they are afterwards connected and form a material part thereof, pass under a subsequent conveyance of such system, as trade fixtures. *Dodge City Water & Light Co. v. Alfalfa Irr. & Land Co.*, 64 Kan. 247 (67 Pac. Rep. 462). Water closets in a building erected upon adjoining lots belonging to different owners, placed in the upper stories thereof at their joint expense, but wholly on the side of the building belonging to one of them, for the accommodation of their tenants on these floors, while not divided by any partition walls, are real estate and pass to the owner of that part of the building upon the subsequent division of the upper stories by the erection of walls. *Quimby v. Straw*, 71 N. H. 160 (51 Atl. Rep. 656). For particular allegations held not sufficient to present the question as to whether a telephone line and box in a home constitute fixtures which pass to the purchaser at judicial sale, see *Mays v. Carman*, (Ky.) 66 S. W. Rep. 1019 (23 Ky. Law Rep. 2216). For particular case as to what constitutes fixtures in a building occupied as a theatre, see *Temple Co. v. Penn. Mutual Life Ins. Co.*, N. J. L. (54 Atl. Rep. 295).

Sec. 270. What constitutes a fixture—Debris of destroyed buildings. Personality, such as bricks and lumber, when used in building a house upon land, becomes realty, and constitutes a part of the land. If the house is destroyed by an accidental fire, and the bricks and other debris fall upon the land, they still remain a part of the realty if the owner does nothing to show an intention to sever them, and convert them again into personality. In such a case the owner can not remove them from the land after a sale of the land to another, nor hold the vendee accountable for them. *Guernsey v. Phinizy*, 113 Ga. 898 (39 S. E. Rep. 402; 84 Am. St. Rep. 267). The court say: "Whatever may be the law of fixtures with regard to articles not firmly annexed to the soil, it is clear that, when the owner of land uses brick, lumber, and other personality for the construction of a substantial and permanent building upon his

land, they become a part of the realty. Brick, though personal property before they were put into the house, become afterwards attached to and a part of the land, and so remain until severed, and reconverted into personalty, by the owner. If a house of brick be destroyed by accident, and the walls fall, the brick may be converted into personalty by any act of the owner which evidences his intention to so sever them. As long, however, as the owner leaves them as they have fallen, some of them in the foundation walls, and some scattered over the land, they remain real property, and a part of the land. In the case of *Rogers v. Gillinger*, 30 Pa. 185 (72 Am. Dec. 694), it appeared that a house was blown down by a storm, the lumber of which it had been composed falling upon the land. Subsequently the land was sold, and a contest arose over the ownership of this lumber. It was held that the lumber remained realty, and a part of the land, and passed, with the land, to the vendees. In the opinion Mr. Justice Strong said: 'What, then, is the criterion by which we are to determine whether that which was once a part of the realty has become personalty on being detached? Not capability of restoration to the former connection with the freehold, as is contended, for the tree prostrated by the tempest is incapable of reannexation to the soil, and yet it remains realty. The true rule would rather seem to be that that which was real shall continue real until the owner of the freehold shall, by his election, give it a different character.' This decision was cited, approved, and followed in *Leidy v. Proctor*, 97 Pa. 486, the court holding that timber which had fallen, but which had not been converted into rails, etc., by the owner, passed to the purchaser as a part of the realty. The case of *Rogers v. Gillinger*, 30 Pa. 185 (72 Am. Dec. 694), is also cited with approval in 1 Washb. Real Prop. (5th Ed.) p. 16; 4 Shars. & B. Lead. Cas. Real Prop. 518. 1 Kerr, Real Prop. p. 96. In the present case the record does not disclose that the vendors of the premises severed the bricks from the land, or did any act evincing an intention to reconvert them into personalty. We think that the bricks remain, therefore, a part of the realty, and that the judge did not err in holding that they belonged to the purchaser."

Sec. 271. What constitutes a fixture—Log and brush fence on Government land. A log and brush fence, set up to enclose a tract of United States government land by one having no title thereto, and partly placed, by mistake, on an

adjoining tract, is a part of the realty, as between its builder and one afterwards acquiring a government deed to the adjoining tract, and the property of the latter. *Hereford v. Pusch*, Ariz. (68 Pac. Rep. 547). The court say: "The position relied upon by the appellee, that the fence was personal property and the plaintiff should be allowed to remove it because of the liberal construction given to the law of fixtures in the consideration of trade fixtures, is untenable, because of the fact that a pasture fence is not, and has never in any instance been considered, a trade fixture, and because of the further fact that the liberal construction placed by the courts upon the law relative to trade fixtures has been nearly invariably adopted in cases arising between the landlord and tenant, while no such relation can be said to exist in this case. This subject was very exhaustively considered, and very ably presented, by Justice Cowan in the case of *Walker v. Sherman*, 20 Wend. 636, and has been very generally followed from that time to the present. The court there held: 'The question is one between tenants in common, the owners of the fee, and is, we think, to be decided on the same principle as if it had arisen between grantor and grantee. * * * As between such parties, the doctrine of fixtures making it a part of the freehold, and passing with it, is more extensively applied than between any others. As between the tenant for life or years and reversioner or remainderman, all erections by the former for the purpose of trade or manufactures, though fixed to the freehold, are considered as his personal property, and as such may be removed by him during his term, or be made available to his creditors, * * * whereas they are carried, by a devise or other conveyance of the land, to the devisee or vendee. * * * The general rule is that anything of a personal nature can not be considered as an incident to the land, even as between vendor and vendee. * * * This is not universally so. Our ordinary farm fences of rails, and even stone walls, are affixed to the premises in no other sense than by the power of gravitation. It is the same with many other erections of the lighter kind about the farm.' The relaxation of the ancient doctrine respecting fixtures that has obtained in favor of tenants and against landlords, and the distinction between the relation of vendor and vendee on one hand and tenant and landlord on the other, is considered at length in this decision, and is distinctly recognized, and the inconsistency that appears to arise in the American decisions is largely attributed to the courts' not attending to the distinc-

tion maintained by the older cases between the two relations of vendor and vendee and tenant and landlord. The rulings of our courts in recent years, to the effect that the intention of the parties very largely controls the question whether personal property loses its character of personal property and becomes realty by reason of being affixed to the freehold for the purpose of trade or manufacture, will be found, on examination, to apply only as between the parties themselves, where no innocent purchaser has come into consideration in the case. That doctrine is correctly set forth in *Treadway v. Sharon*, 7 Nev. 37 in which case it is held that trade fixtures do become part of the realty, whatever intention to the contrary on the part of the tenants erecting them may be inferred, but the law indulges the tenant with the right of removing them during his term, as between the tenant and landlord, but they pass by a grant of the land as a part of the realty, and when placed on public land by one in possession without title the one who thus places them there has no greater right to the fixtures as against one whom he suffers to acquire title to the land than has the vendor of land as against his vendee. It has been held by the courts, without exception, that not only as between vendor and vendee the fences pass by grant of the land, but that a fence placed on government land by mistake passes with the land to a subsequent purchaser from the government. *Seymour v. Watson*, 5 Blackf. 555 (36 Am. Dec. 556); *Merritt v. Judd*, 14 Cal. 59; *Johnson's Ex'r v. Wiseman's Ex'r*, 4 Metc. (Ky.) 360 (83 Am. Dec. 475); *Rowand v. Anderson*, 33 Kan. 264 (6 Pac. Rep. 255; 52 Am. Rep. 529); *Railroad Co. v. Morgan*, 42 Kan. 23 (21 Pac. Rep. 809; 4 L. R. A. 284; 16 Am. St. Rep. 471); and it has been held in California that a statute allowing those who put improvements on public lands of the United States to remove the same within six months after the land has become the private property of any person, and declaring fences to be improvements within the meaning of said act, in so far as it relates to improvements which as fixtures have become part of the realty, is void. *Collins v. Bartlett*, 44 Cal. 371; *Pennybecker v. McDougal*, 48 Cal. 160; *McKiernan v. Hesse*, 51 Cal. 594."

Sec. 272. What constitutes a fixture—Machinery—Furnace boiler to supply house with hot water. In order for machinery to constitute real estate actual annexation as well as an intention permanently to annex them to the free-

hold must appear; and where machines came upon premises as completed articles of merchandise, are fastened to the floors by adjustable attachments for the purpose of keeping them from displacement while in use by the application of the power, are in no way built or incorporated into the real estate, can be removed either without injury to themselves or to the building in which they are located, they will be held to remain personal property. *Knickerbocker Trust Co. v. Penn Cordage Co.*, 62 N. J. Eq. 624 (50 Atl. Rep. 459). To constitute a fixture there must be not only a physical annexation in some form to the realty, but there must be unity of title; hence machinery placed in a building owned by a husband and wife by entireties, in pursuance of a contract of sale to the husband, in which the seller reserves the title, may be removed for nonpayment of the purchase price, if such removal will not materially injure the machinery or the building. *Schellenberg v. Detroit Heating & Lighting Co.*, 130 Mich. 439 (90 N. W. Rep. 47; 57 L. R. A. 632). A hop press of a kind that are constructed without reference to use in any particular building, but are articles of merchandise bought and sold in the market, when placed in a building in such a manner as to be capable of being moved without material injury to the building, is not a fixture so as to pass to a vendee of the land, nor does it pass on account of the contract of sale stipulating for a conveyance of the land "together with the appurtenances." *Sherrick v. Cotter*, 28 Wash. 25 (68 Pac. Rep. 172; 92 Am. St. Rep. 821).

A furnace and boiler set on a specially prepared brick foundation in the cellar of a house, for the purpose of supplying the various rooms of the house with hot water, will be treated as a fixture forming part of the house, in adjusting insurance losses on the house and its contents, although it could be disconnected from the pipes or flues and removed, without any injury to the building, by taking it to pieces and removing the sections. *West v. Farmers' Mut. Ins. Co.*, 117 Ia. 147 (90 N. W. Rep. 523). The court say: "Turning now to the cases, we find that, as between vendor and vendee, a Franklin stove, set into a fireplace, with brickwork, has been held a part of the realty. *Smith v. Heiskell*, 1 Cranch, (C. C.) 99 (Fed. Cas. No. 13056); *Folsom v. Moore*, 19 Me. 252; *Blethen v. Towle*, 40 Me. 310. And also as to an execution creditor. *Godard v. Chase*, 7 Mass. 432. Likewise as between heir and administrator. *Tuttle v. Robinson*, 33 N. H. 104. So, also, with a furnace like the one in this case, in favor of a mechanic's lien

claimant, *Stockwell v. Campbell*, 39 Conn. 362 (12 Am. Rep. 393); *Thielman v. Carr*, 75 Ill. 385. With relation to the boiler, it may be said that it is but an enlargement of the hot-water pipe, and such pipes are universally held to be fixtures. In *Ostrader, Ins.* p. 435, the author, in speaking of the appurtenances which will be considered as parts of a building under an insurance contract, specifies a furnace or boiler, radiators, and piping, gas and water fixtures, bathroom equipments, and the 'more permanent appliances of the laundry and kitchen.' Mr. Warvelle, also, in his work on Vendors (section 10), enumerates as fixtures, and therefore which would pass by deed, gas pipes and fittings, boilers, tanks, and hot-air furnaces, and, generally, 'anything which the vendor has annexed to the building for the mere convenient use and improvement of the property.' In *Capehart v. Foster*, 61 Minn. 132 (63 N. W. Rep. 257; 52 Am. St. Rep. 582), it is decided that the radiators of a steam-heating apparatus are parts of the realty, and in that case it is said, speaking of the holdings that gas fixtures are chattels, 'But the rule as applied to gas fixtures must be regarded as rather an arbitrary exception to the general rule, and should not be extended.' The case of *Trust Co. v. Miller*, 20 Wash. 607 (56 Pac. Rep. 382; 44 L. R. A. 559; 72 Am. St. Rep. 138), in which it is held that a hot-water heater and a bath tub standing on legs, both attached to the plumbing, and mantels fastened to the wall with screws, are not parts of the building, but are removable, as against a mortgagee, goes too far to commend itself to our favorable consideration. In many instances those cases which at first reading may seem to be in direct conflict with the authorities first cited will be found to rest the solution of the question upon the intent of the owner. *Turner v. Wentworth*, 119 Mass. 459; *Towne v. Fiske*, 127 Mass. 125 (34 Am. Rep. 353); *Allen v. Mooney*, 130 Mass. 155; *Rathway Sav. Inst. v. Irving St. Baptist Church*, 36 N. J. Eq. 61. See, also, *Manwaring v. Jenison*, 61 Mich. 117 (27 N. W. Rep. 899)."

Sec. 273. Right to fixtures—Vendor and vendee. Store fixtures placed in a building by the owner thereof at the time of its erection to more perfectly complete it as a place for carrying on a merchandise business, pass to a purchaser of the building under foreclosure of a mortgage of it. *Johnston v. Philadelphia Mortg. & Trust Co.*, 129 Ala. 515 (30 So. Rep. 15; 87 Am. St. Rep. 75). A conveyance by a realty corpora-

tion of lots in a platted addition to a city laid out and owned by it, "together with all rights, privileges, immunities, and appurtenances," does not pass its title to water pipes laid by it in the streets of such addition, which were connected, under license from the city, with its water mains, and through which water was furnished to the residents on such lots under an arrangement by which they collected and paid water rents; but such pipes are personalty and may be sold by the owner corporation to another. *Mulrooney v. Obear*, 171 Mo. 613 (71 S. W. Rep. 1019). Replevin will lie by a vendor for a house built by his vendee but removed by him without right, on the theory that the legal title vested in him, and that by a severance of the house from the lands the title remained unchanged, but that the house might thenceforth be treated as personalty. *Cutter v. Wait*, 131 Mich. 508 (91 N. W. Rep. 753).

Sec. 274. Right to fixtures—Mortgagor and mortgagee. A mortgagee of real estate can not, because of his mortgage lien, maintain an action in replevin for the possession of property removed from the mortgaged premises which he claims as fixtures to the realty. *Moore v. Moran*, 64 Neb. 84 (89 N. W. Rep. 629). An ordinary portable kitchen range, placed in an apartment house under a contract of conditional sale, does not become a fixture so as to pass to a mortgagee of the building, where its only connections to the building are the pipe to the flue and water pipes leading to a detachable hot water reservoir. *Jennings v. Vahey*, 183 Mass. 47 (66 N. E. Rep. 598). Where one having a stock of nursery trees growing on land in which he has no interest joins the owner of the land in executing a mortgage on it, and at the time calls attention to the nursery stock as enhancing the value of the land as security, they will be regarded as part of the realty; and the mortgagee removing or injuring such trees while his interest is merely that of a mortgagee is liable, as for injury to the land. *DuBois v. Bowles*, Colo. (69 Pac. Rep. 1067). On the first point, the court say: "As between landlord and tenant, the general rule is the latter may remove nursery trees. As between mortgagor and mortgagee, or vendor and vendee, however, the rule is different, and nursery trees planted by the owner of real estate become a part of the realty, and pass, as such, under a mortgage, although so long as the mortgagor has the right to redeem he would have the right, in the ordinary course of trade, to sell such of the stock as was suitable for

transplanting. *Maples v. Millon*, 31 Conn. 398; *Adams v. Beadle*, 47 Ia. 439 (29 Am. Rep. 487); *Price v. Brayton*, 19 Ia. 309." Property which generally would pass with land as trade fixtures may be exempt from a mortgage of the land, by agreement of the parties. *Richards v. Gilbert*, 116 Ga. 382 (42 S. E. Rep. 715). The court say: "It is true, as a general proposition, that the intention of the parties is to be determined by a construction of the language used in the conveyance, but it is also undoubtedly true that collateral agreements extrinsic to the conveyance may control the question as to what articles pass as a part of realty conveyed. *Foster v. Prentiss*, 75 Me. 279; *Elliott v. Wright*, 30 Mo. App. 217. It has been ruled that this question may also be controlled by evidence of other transactions which show that the intention of the parties to the conveyance was that particular fixtures should be treated as personalty. *Zeller v. Adam*, 30 N. J. Eq. 421; *Fortman v. Goepper*, 14 O. St. 558." For construction of particular mortgage by laundry company as to what passes under it as fixtures, see *Atlantic Safe Dep. & T. Co. v. Atlantic City Laundry Co.*, 64 N. J. Eq. 140 (53 Atl. Rep. 212).

Sec. 275. Right of tenant to remove fixtures. A lessee who has erected structures on leased premises in pursuance of an agreement with his lessor to pay him the reasonable value thereof, or to allow him to remove the same whenever he should "surrender and deliver up possession of the premises at the expiration of any lease he might hold from him," may recover their value of the lessor where he has sold and conveyed the premises without any reservation of the lessee's rights, and the latter has attorned to the purchaser. *Smyth v. Stoddard*, 203 Ill. 424 (67 N. E. Rep. 980; 96 Am. St. Rep. 314). A mill erected and equipped with machinery on leased premises by the lessee thereof, and which he has a right to remove, is personal property and may be mortgaged as such; and after the owner executes such a mortgage thereon he is estopped to deny that the mortgaged property is personalty. *Gordon v. Miller*, 28 Ind. App. 612 (63 N. E. Rep. 774). A lessee of a hotel erecting thereto a platform so constructed as to appear to be a part of the realty, under contract with the owner that he might remove it when he vacated the premises, but who fails to do so, can not assert the right to remove the platform as against a subsequent lessee who has taken possession without notice of the agreement. *Trask v. Little*, 182 Mass. 8 (64 N. E.

Rep. 206). Ovens, engines and a boiler necessary for the operation of a bakery and other machinery incident thereto, placed by lessees in a building leased for a bakery, are removable by them as trade fixtures, where they rest upon independent foundations constructed by the lessees, and are unattached to the building which can be rendered capable of the ordinary uses after the removal of such fixtures merely by closing up the holes in the several floors thereof through which the ovens passed. *Baker v. McClurg*, 198 Ill. 28 (64 N. E. Rep. 701; 59 L. R. A. 131; 92 Am. St. Rep. 261). Domestic or ornamental fixtures which a tenant has attached to a dwelling house or the grounds on which the same is located to promote his domestic comfort, and which may be easily severed, and made equally useful to him in another house, may be removed by him during his term; but the rule is otherwise as to such as are substantial additions to the house, or which, if taken away, would be injurious to the freehold. A servant's room, metallic gutters attached to the roof of the house, water pipes laid under the ground by a tenant on leased premises become, when constructed and attached, a part of the freehold, and can not be lawfully dissevered from the land by the tenant against the will of the landlord, even though at the time of their erection the tenant intended to remove them at the expiration of his term. *Wright v. Du Bignon*, 114 Ga. 765 (40 S. E. Rep. 747; 57 L. R. A. 669). A corn crib erected by a farm lessee resting on posts sunk in the earth several inches, under a verbal agreement between the lessor and lessee that the latter might remove it, will be treated as a fixture as against a subsequent purchaser of the farm without notice of the agreement. *Smyth v. Stoddard*, 203 Ill. 424 (67 N. E. Rep. 980).

Sec. 276. Right of tenant to remove fixtures—Water closet placed in buildings by tenant at will. "A wash-down siphon water-closet" and its appurtenances, put into a business office in the usual manner by a tenant at will for his own use, and which can be removed without material injury to the realty, does not become merged into the realty unless it was so put in with an intention to make a permanent accession to the realty. The fact that the water-closet was connected with a soil pipe, also put in by the tenant, and left by him affixed to the realty, does not prevent his disconnecting and removing the water-closet. A tenant so putting in a water-closet may transfer the same to his successor in the tenancy, and the last

tenant thus acquiring it may remove it during his term. *Hayford v. Wentworth*, 97 Me. 347 (54 Atl. Rep. 940). After a full statement of the general rules governing the determination of what constitutes a fixture, the court say: "The citation of some authorities may perhaps enforce our reasoning, and make our conclusion more acceptable. In *Tyler on Fixtures*, 385, it is said; 'As a rule, any fixture made by a tenant for his own comfort, convenience or pleasure, may be removed by him during his term, provided the same can be removed without serious injury to the realty, the same as in cases of fixtures for the purposes of trade or manufactures.' In *Taylor on Landlord and Tenant* (8th Ed.), at the end of section 544, it is said: 'In modern times the rule is understood to be that, upon principles of general policy, a tenant, whether for life, years, or at will, is permitted to carry away all such fixtures of a chattel nature as he has himself erected on the demised premises for the purpose of ornament, domestic convenience, or to carry on trade, provided the removal can be effected without material injury to the freehold.' In section 547 domestic fixtures are defined to be 'such articles as a tenant attaches to a dwelling house in order to render its occupation more comfortable or convenient, and may be separated from it without doing substantial injury.' This definition would seem to be as applicable to an office room as to a dwelling house. In *Gaffield v. Hapgood*, 17 Pick. 192 (28 Am. Dec. 290), the court said that a fire frame fixed in a common fireplace, with bricks on the sides, laid in between the sides of the fire frames and the jambs and the fireplace, and the facing plastered over, remained a chattel, which a tenant so affixing could remove during his term. In *Guthrie v. Jones*, 108 Mass. 191, gas fixtures screwed upon the gas pipes of a room were held to remain chattels as between landlord and tenant. In *Wall v. Hinds*, 4 Gray, 256 (64 Am. Dec. 64), a cistern and sinks fastened to the floor by nails, or set in the floor by cutting away boards; water pipes fastened by hooks driven into the plastering and walls, and passing through holes cut by the tenant in the floors and partitions; gas pipes passing from the street into the cellar, and thence up through the floor and branching into different rooms through holes cut in the floor and partitions (and in some cases through ornamental ceiling centerpieces) by the tenant for that purpose, the pipes being kept in place by metal bands fastened to the walls and ceilings—were all held to remain chattels. In *Towne v. Fiske*, 127 Mass. 125 (34 Am. Rep. 353), a portable iron

furnace was set upon the earth in the middle of the cellar, and then the cellar bottom was covered with concrete up to and around the furnace. The furnace was connected by hot-air pipes with registers in the various rooms, set in soapstone collars. Gas pipes were also screwed to gas pipes fixed in the house. All these, having been put in the house by the person occupying under a verbal contract to purchase, were held to remain chattels. In *Philadelphia M. & T. Co. v. Miller*, 20 Wash. 607 (56 Pac. Rep. 382; 44 L. R. A. 559; 72 Am. St. Rep. 138), a mortgagor placed in his dwelling house a porcelain bathtub, standing on four legs and connecting in the usual manner with the soil pipes, and also a hot-water heater, connected therewith by the usual methods of plumbing. The case was submitted to a jury, who found that the articles remained chattels, and the court rendered judgment on the verdict. In the opinion, stress was laid on the circumstances that none of the articles were made or fitted for that particular house, but all were made up and kept in stock by dealers, to be sold for and set up in any house. In *Seeger v. Pettitt*, 77 Pa. 437 (18 Am. Rep. 452), gas fixtures, platform scales, a walnut railing, a staircase and some banisters, a coal bin and some shelving, were put into leased premises by different tenants at different times; each outgoing tenant transferring his interest in them to his successor. A ruling that these articles could not be removed by the last outgoing tenant was held erroneous. The procedure in this case was much like that at bar. The landlord brought an action at law against the outgoing tenant for removing these articles from the building. The case was tried to a jury, and evidence adduced pro and con. The presiding justice ruled, as matter of law, that the articles were not removable by the defendant. This was held to be error. The court said: 'The matter of fixtures should have been left to the jury, as a question of intention.' In *Hanson v. News Pub. Co.*, 97 Me. 99 (53 Atl. Rep. 990)—the latest expression of this court on this subject,—partitions placed in a store by a tenant for his own convenience, and nailed to the floor and screwed to the walls, were held not to have become a part of the realty."

Sec. 277. Right of tenant to remove fixtures—Loss or waiver of right by taking new lease. The cancellation of a lease taken by a partnership in order to accommodate a member desiring to retire from the firm and the taking of a lease on the same terms from the other member of the firm is not

such a new leasing of the premises as would prevent the remaining tenant from removing trade fixtures previously erected on the premises by the firm. *Baker v. McClurg*, 198 Ill. 28 (64 N. E. Rep. 701; 59 L. R. A. 131; 92 Am. St. Rep. 261). Where a lessor, at the time of leasing his premises, sells to his lessee trade fixtures thereon and empower him, "his heirs or assigns, to remove any or all of said property," the lessee does not lose his right to remove such fixtures by taking a new lease after the expiration of the first which failed to mention or reserve such articles. *O'Brien v. Mueller*, 96 Md. 134 (53 Atl. Rep. 663). In the case of *Spencer v. Commercial Co.*, 30 Wash. 520 (71 Pac. Rep. 53), the supreme court of Washington say: "The weight of authority seems to be that where the tenant enters into a new lease, making no mention of a former lease or tenancy, and with no reservation for removal of fixtures placed under the former lease, his right to remove fixtures is thereby precluded. 2 Tayl. Landl. & Ten. (8th ed.) § 552; 2 Wood, Landl. & Ten. (2d Ed.) § 529; 13 Am. & Eng. Enc. Law (2d Ed.) 651; *Loughran v. Ross*, 45 N. Y. 792 (6 Am. Rep. 173); *Talbot v. Cruger*, 151 N. Y. 117 (45 N. E. Rep. 364). *Watriss v. Bank*, 124 Mass. 571 (26 Am. Rep. 694); *Jungerman v. Bovee*, 19 Cal. 355; *Marks v. Ryan*, 63 Cal. 107; *Carlin v. Ritter*, 68 Md. 478 (13 Atl. Rep. 370; 16 Atl. Rep. 301; 6 Am. St. Rep. 467); *Hedderich v. Smith*, 103 Ind. 203 (2 N. E. Rep. 315; 53 Am. Rep. 509); *Williams v. Lane*, 62 Mo. App. 66. The reason for this rule is stated in *Hedderich v. Smith*, 103 Ind. 203 (2 N. E. Rep. 315; 53 Am. Rep. 509), as follows: 'It results from the terms of the lease that whatever constituted a part of the freehold at the time the lease was accepted must be surrendered at its termination, and the lessee will not be permitted to say that part of the premises leased was in fact a trade fixture, erected by him under a previous lease, and that he has the right, against the face of his contract, to sever and remove it. To permit the tenant to do this would, in effect, be to permit him to deny the title of his landlord to part of the demised premises; and, if he may deny his title to a part, why not to the whole?' In the case of *Carlin v. Ritter*, 68 Md. 478 (13 Atl. Rep. 370; 16 Atl. Rep. 301; 6 Am. St. Rep. 467), the court says: 'If it was the intention of the parties in this or any other similar case that the right to remove fixtures should continue, nothing was easier than to insert in the lease a clause to that effect; and it seems to us reasonable to infer, from the absence of such a clause, that it was their in-

tention that this right should no longer continue.' This rule does not apply when the tenant merely holds over without a new demise, under permission from the landlord, or in such a way as to raise an implication of an extension of the original lease. 13 Am. & Eng. Enc. Law, p. 651, and cases cited; Wood, Landl. & Ten. § 552; Tayl. Landl. & Ten. § 529; Estabrook v. Hughes, 8 Neb. 496 (1 N. W. Rep. 132); Wright v. MacDonnell, 88 Tex. 140 (30 S. W. Rep. 907); Young v. Implement Co., 23 Utah, 586 (65 Pac. Rep. 720); Lewis v. Pier Co., 125 N. Y. 341 (26 N. E. Rep. 301); MacDonough v. Starbird, 105 Cal. 15 (38 Pac. Rep. 510); Glass v. Coleman, 14 Wash. 635 (45 Pac. Rep. 310). Opposed to the rule that the taking of a new lease waives the right of removing fixtures are the cases of Kerr v. Kingsbury, 39 Mich. 150 (33 Am. Rep. 362), and Second Nat. Bank v. O. E. Merrill Co., 69 Wis. 501 (34 N. W. Rep. 514)."

See, on the subject of this section, Union Terminal Co. v. Wilmar & S. F. Ry. Co., 116 Ia. 392 (90 N. W. Rep. 92).

Sec. 278. Right of tenant to manure. A lessee of a dairy farm who has animals collected thereon in excess of the number it is capable of supporting, is entitled to a proportionate part of the manure accumulated on the farm during his tenancy, where a large part of it is the product of feed not grown on the farm, but purchased by him. Nason v. Tobey, 182 Mass. 314 (65 N. E. Rep. 389; 94 Am. St. Rep. 659). The court say: "Undoubtedly manure made in the ordinary course of husbandry belongs to the landlord. Daniels v. Pond, 21 Pick. 367 (32 Am. Dec. 269). And it may be that under some circumstances it would belong to him, even if made from hay furnished by the tenant. Lassell v. Reed, 6 Greenl. 222; Lewis v. Lyman, 22 Pick. 437, 442. But when animals are collected on land in excess of the number which it is capable of supporting, and they are kept there and fed upon purchased food for some other purpose than is incident to agriculture, a different rule applies. Pickering v. Moore, 67 N. H. 533 (32 Atl. Rep. 828; 31 L. R. A. 698; 68 Am. St. Rep. 695); Gallagher v. Shipley, 24 Md. 418, 429 (87 Am. Dec. 611). See Fay v. Muzzey, 13 Gray, 53, 56 (74 Am. Dec. 619); Fletcher v. Herring, 112 Mass. 382, 384. It may be that if a question of apportionment were before us, it would be proper to take it into account, on the defendant's side, that the milk sold from the farm was a substantial drain on the land, but we have to

consider only whether it appears that the plaintiff could recover nothing, as matter of law. On the facts stated he had a right, if not to the whole pile of manure, to some ascertainable proportion of it which could be measured off to him. The defendant prevented him from taking any part, and claimed the whole. It was going too far to say that the plaintiff could recover nothing. *Pickering v. Moore*, 67 N. H. 533, 536 (32 Atl. Rep. 828; 31 L. R. A. 698; 68 Am. St. Rep. 695)." See *Ballard's Law of Real Property*, Vol. VIII, §§ 313-315.

FORCIBLE ENTRY AND DETAINER.

EPITOME OF CASES.

Sec. 279. As to when the action will lie and who may maintain it. A quasi public corporation engaged in the business of supplying electricity, for lighting and other purposes, to municipalities and their inhabitants, which, by its holding over as a lessee, is brought within the provisions of the forcible entry and detainer statute (Me. Rev. Stat., ch. 94, § 1), may be subjected to the action. *Bodwell Water Power Co. v. Old Town Elec. Co.*, 96 Me. 117 (51 Atl. Rep. 802). One who peaceably takes possession of land in pursuance of a mandatory injunction issued by a court is not guilty of forcible entry and detainer, although it is subsequently determined that the injunction was erroneously issued. *Okla. Stat.*, § 4805 construed and applied. *Franz v. Saylor*, 12 Okla. 282 (71 Pac. Rep. 217). When a person holds possession of lands under a contract of purchase he can not be dispossessed by summary proceedings against him as a tenant. *Griffith v. Collins*, 116 Ga. 420 (42 S. E. Rep. 743). Where one is in actual possession of a part of a tract of land described in a deed under which he claims, his constructive possession of the remainder will sustain an action by him against one entering and constructing buildings thereon without his consent. *Seals v. Williams*, 80 Miss. 234 (31 So. Rep. 707; 92 Am. St. Rep. 601). Where a person is a settler or occupier of lands without color of title, and to which the plaintiff has the right of possession, forcible

entry and detainer is the appropriate remedy. *Cope v. Braden*, 11 Okla. 291 (67 Pac. Rep. 475). A landlord can not dispossess by forcible detainer his tenant who has availed himself of the privilege of extending his term, as provided in his lease, because of a disagreement between them as to rent being due. *Brown v. Samuels*, (Ky.) 70 S. W. Rep. 1047 (24 Ky. Law Rep. 1216). A widow having an unassigned dower right in land is not the owner thereof so as to entitle her to prosecute an indictment for forcible entry and detainer. *State v. Thompson*, 130 N. C. 680 (41 S. E. Rep. 486). A married woman can not maintain an action for forcible entry and detainer, when it appears that at the time of the acts complained of her husband was in actual possession of the premises in question. *Funkhauser v. State*, 67 N. J. L. 132 (50 Atl. Rep. 580).

Sec. 280. Description of premises in affidavit for dispossession. A description of the premises in an affidavit for dispossession in a summary proceeding under the New Jersey landlord and tenant act (2 Gen. Stat., p. 1918, § 12), as "the westerly portion of the building known as 'Newberg's Hotel,' situate on Broadway, Long Branch city, in the county of Monmouth," is sufficient to comply with the statute. *Newing v. State*, 67 N. J. L. 96 (50 Atl. Rep. 493). The court say: "The statute is surely complied with when in the description there is a sufficient certainty to advise the tenant what premises it is which are claimed, and the officer the premises from which the tenant is to be dispossessed, in case a writ issues for that purpose. We have no case in point in our state. It would seem that a description of premises which at common law would have been good in ejectment should be sufficient in proceedings under our landlord and tenant act. The following descriptions were held sufficient in ejectment in the early cases. A description of premises as the premises called the 'Black Swan,' is good. The description reduces it to a certainty of a dwelling house. *Burbury v. Yeomans*, 1 Sid. 295. For a place called 'a passage room' is certain enough. *Bindover v. Sindercombe*, Ld. Raym. 1470. So, also, 'a room and a chamber in the second story.' *Anonymous*, 3 Leon. 210. So, also, 'for part of a house in A.' is sufficiently certain. *Sullivan v. Seagreaves*, Strange, 695. So, also, is the description as 'a certain place called the vestry.' *Hutchison v. Puller*, 3 Lev. 95. A description of a piece of land known as 'Fetty's Fortune' was

held sufficient; the court saying that the ejectment may be maintained for land by its reputed name. *Fouke v. Kemp's Lessee*, 5 Har. & J. 135. Adams on Ejectment, after referring to many cases on this subject, says: 'With respect to the manner in which the disputed premises should be described in an ejectment, no determined rule exists, nor is it easy to discover from the adjudged cases any principle which can guide us on the subject. It is very frequently said, in general terms, that the description shall be sufficiently certain, but the degree of certainty required, particularly in the more ancient cases, seems to depend on caprice, rather than on principle. * * *

The degree of certainty formerly required was much greater than is now necessary, and it is not improbable that many of the old decisions would be overruled should they again come under the consideration of the courts.' Adams Ejec. p. 23. Our own cases say that 'an action of ejectment may be maintained for land by its reputed name.' *Palmer v. Sanders*, 51 N. J. L. 408 (17 Atl. Rep. 1084)".

Sec. 281. Complaint. A complaint substantially in the words of the statute is sufficient. *Locke v. Skow*, (Neb.) 91 N. W. Rep. 572. Construing and applying R. I. Gen. Laws, ch. 271, § 1, requiring the complaint to be made in writing and under oath, it is held that the verification must be by the complainant. *Levy v. David*, 24 R. I. 249 (52 Atl. Rep. 1080). A complaint in an action of unlawful detainer, describing the land sought to be recovered as "the land actually occupied by R.'s old house, north of J.'s new house. Said house is about thirty rods southeast of the old K. house, on an unrecorded plat of lands south of W. street and west of R. avenue, known as the 'K. tract,' in the city of E., S. county, Washington," was held sufficient. Where the action is against a tenant for a specified term holding over, under a statute (2 Bal. Ann. Wash. Codes & Stat., § 5527, subd. 1) making such a person guilty of unlawful detainer, it is sufficient for the complaint to allege that the defendant held over after the specified term of the lease. *Stanford Land Co. v. Steidle*, 28 Wash. 72 (68 Pac. Rep. 178).

Sec. 282. Defenses. Proof by a lessee holding over that by the terms of his lease he was entitled to a renewal, his request for which had been refused by the lessor, will not defeat the right of the latter to judgment where he has established the facts entitling him to it, under Conn. Gen. Stat., §

1357. *Platt v. Cutler*, 75 Conn. 183 (52 Atl. Rep. 819). A lessee who on account of his holding over after the termination of his lease has subjected himself to an action of forcible entry and detainer, under Me. Rev. Stat., ch. 94, § 1, can not defend against the action on the ground that his lease contained a stipulation that the lessor shall at his option, upon the termination of the lease, either buy the property placed upon the premises by the lessee or allow him to remove the same. *Bodwell Water Power Co. v. Old Town Elec. Co.*, 96 Me. 117 (51 Atl. Rep. 802). The failure of a landlord to comply with a condition in a lease of a house from month to month, binding him to pay the tenant for the furniture in the house in case the landlord terminated the lease, can not be set up by the tenant as a defense in an action of unlawful detainer. Bal. Ann. Wash. Codes & Stat., § 5538 construed and applied. *Carmack v. Drum*, 27 Wash. 382 (67 Pac. Rep. 808).

Sec. 283. Practice—Statutes construed. The thing in dispute in actions of forcible detainer and forcible entry and detainer is not the title to the real estate, nor the right to acquire title, but the mere right to its possession. If the title or right to title becomes involved, it is as an incident only, and not as the main object of the controversy. Title and evidences of title may be introduced in evidence, and considered on the trial of such causes, for the purpose of determining the claim to the right of possession. *McQuiston v. Walton*, 12 Okla. 130 (69 Pac. Rep. 1048); *Brown v. Hartshorn*, 12 Okla. 121 (69 Pac. Rep. 1049). An allegation in a complaint otherwise sufficient, that the plaintiff is the owner of the premises described, will be treated as descriptive of his right of possession, and not as raising the question of title; nor is the court divested of jurisdiction by an answer asserting an equitable right to declare a resulting trust in the land. *McClung v. Penny*, Okla. (69 Pac. Rep. 499). An action of forcible entry and detainer is purely a proceeding at law, and does not and can not involve the exercise of equitable jurisdiction, the right of possession being the sole question involved. *Cope v. Braden*, 11 Okla. 291 (67 Pac. Rep. 475); *Anderson v. Ferguson*, 12 Okla. 307 (71 Pac. Rep. 225). Where a complaint is for a specifically described portion of land a judgment for restitution "of the premises described in the complaint" is sufficient. *Locke v. Skow*, (Neb.) 91 N. W. Rep. 572.

Cal. Code Civ. Proc., § 113, subd. 1; §§ 1160, 1161, con-

strued and applied—jurisdiction of justice of the peace. *Ivory v. Brown*, 137 Cal. 603 (70 Pac. Rep. 657). Cal. Code Civ. Proc., § 1161, subs. 1, 2 construed and applied—action against tenant holding over—notice by landlord. *Earl Orchard Co. v. Fava*, 138 Cal. 76 (70 Pac. Rep. 1073); *Lacrabere v. Wise*, Cal. (71 Pac. Rep. 175). Cal. Code Civ. Proc., § 1159 construed and applied—what constitutes a forcible entry. *Kerr v. O'Keefe*, 138 Cal. 415 (71 Pac. Rep. 447). Cal. Code Civ. Proc., § 1174 construed and applied—assessment of damages. *Nolan v. Hentig*, 138 Cal. 281 (71 Pac. Rep. 440). *Mills' Ann. Colo. Stat.*, § 1973; ch. 11, §§ 168, 169, construed and applied—action against vendee retaining possession after default in his contract—damage. *Ruth v. Smith*, 29 Colo. 154 (68 Pac. Rep. 278). Proof of entry into an occupied dwelling house during the temporary absence of the person entitled to possession is held not to authorize a verdict for plaintiff in civil proceedings for forcible entry and detainer, brought under Ga. Civ. Code, § 4823. *Griffin v. Griffin*, 116 Ga. 754 (42 S. E. Rep. 1005). In proceedings to eject intruders, brought under Ga. Civ. Code, § 4808 et seq., if the defendant establishes a good faith claim of a right to be upon the land, it is error to direct a verdict for the plaintiff. *Lane v. Williams*, 117 Ga. 124 (39 S. E. Rep. 919). Under 2 Starr & C. Ann. Ill. Stat. (2d Ed.) p. 1973, § 2, cl. 4 one entitled to the possession of land may maintain the action against a subtenant unlawfully retaining possession, without joining the lessee who has surrendered the lease. *Rehm v. Halverson*, 197 Ill. 378 (64 N. E. Rep. 388). For cases construing statutes determining questions of practice in the action in Indian Territory, see *Fraer v. Washington*, Ind. Ter. (69 S. W. Rep. 835); *Hill v. Watkins*, Ind. Ter. (69 S. W. Rep. 837); *Hewlett v. Hyden*, Ind. Ter. (69 S. W. Rep. 839); *Engleman v. Cable*, Ind. Ter. (69 S. W. Rep. 894); *Riley v. Catron*, Ind. Ter. (69 S. W. Rep. 908); *Thompson v. Morgan*, Ind. Ter. (69 S. W. Rep. 920). Mich. Comp. Laws, §§ 1161, 1163 construed and applied—taxation of costs. *Stuart v. Corlette*, 129 Mich. 611 (89 N. W. Rep. 342). 3 Mich. Comp. Laws, §§ 11164-11166 construed and applied—proceedings against lessee or his assignee holding possession in violation of terms of lease. *Marvin v. Hartz*, 130 Mich. 26 (89 N. W. Rep. 557). Minn. Gen. Stat. 1894, § 1377 construed and applied—return of summons. *Watier v. Buth*, 87 Minn.

205 (92 N. W. Rep. 331). Title is not an issue in the statutory action provided for by Mo. Rev. Stat. 1899, §§ 3319-3321; and plaintiff may maintain the action on proof of his actual peaceful possession, that defendant unlawfully invaded that possession, and detained the property after written demand therefor. *Rosenberger v. Wabash R. Co.*, 96 Mo. App. 504 (70 S. W. Rep. 395). Mont. Code Civ. Proc., §§ 2081, subd. 1; 2092, construed and applied—what constitutes forcible detainer—pleadings in actions for. *Kennedy v. Dickie*, 27 Mont. 70 (69 Pac. Rep. 672). As to the right of appeal in Nebraska, see *Babby v. Musser*, 64 Neb. 175 (89 N. W. Rep. 742); *Selleck v. Feeney*, (Neb.) 89 N. W. Rep. 1003; *Moore v. Hetzel*, (Neb.) 90 N. W. Rep. 645. Applying Okla. Stat., § 3912, it is held that a cause of action for unlawful and forcible detainer, by one entitled to the possession, in case of a transfer of the interests of the plaintiff, continues in his grantee. *Anderson v. Ferguson*, 12 Okla. 307 (71 Pac. Rep. 225). Okla. Stat. 1893, § 4908 construed and applied—action to recover lands claimed by one as a homestead entryman—service of notice to quit. *Burns v. Noell*, 12 Okla. 133 (69 Pac. Rep. 1076). Okla. Stat. 1893, § 1562 construed and applied—jurisdiction of probate court. *McClung v. Penny*, Okla. (69 Pac. Rep. 499); *Anderson v. Ferguson*, 12 Okla. 307 (71 Pac. Rep. 225). Okla. Stat. 1893, § 4774 construed and applied—bond on appeal—liability of sureties. *Penny v. Richardson*, 12 Okla. 256 (71 Pac. Rep. 227). S. Dak. Comp. Laws, § 6077; Laws 1901, ch. 195, amending Comp. Laws, § 6054, construed and applied—time allowed for appearance and pleading. *Chicago, M. & St. P. Ry. Co. v. Nield*, S. Dak. (92 N. W. Rep. 1069). 2 Bal. Ann. Wash. Codes & Stat., § 4873 construed and applied—service of complaint on defendant; §§ 5527, 5528 construed and applied—sufficient termination of tenancy to authorize the action. *Mounts v. Goranson*, 29 Wash. 261 (69 Pac. Rep. 740). 2 Bal. Ann. Wash. Codes & Stat., § 5532; Laws 1893, ch. 127, § 1, construed and applied—service of summons and complaint. *Security Sav. & Trust Co. v. Hackett*, 27 Wash. 247 (67 Pac. Rep. 607). 2 Bal. Ann. Wash. Codes & Stat., §§ 5525-5552 construed and applied—sufficiency of complaint and verdict. *Quandt v. Smith*, 28 Wash. 664 (69 Pac. Rep. 369). 2 Bal. Ann. Wash. Codes & Stat., § 5527, subd. 1 construed and applied—action against tenant for specified term holding over—notice to quit. *Stanford Land Co. v. Steidle*, 28 Wash. 72 (68 Pac. Rep. 178). 2 Bal. Ann. Wash. Codes & Stat., § 5527

construed and applied—action by landlord against tenant on account of his violating terms of lease. *Spencer v. Commercial Co.*, 30 Wash. 520 (71 Pac. Rep. 53). 2 Bal. Ann. Wash Codes & Stat., §§ 5549-5551, 6046 construed and applied—admissibility of abstract of title to prove title. *Roberts v. Center*, 26 Wash. 435 (67 Pac. Rep. 151).

FRADULENT CONVEYANCES.

EPITOME OF CASES.

Sec. 284. Acquiescence of debtor in being defrauded of his property—Conclusiveness upon his creditors. The acquiescence of a corporation in the act of one of its directors in defrauding it by purchasing property of which it was the equitable mortgagor and immediately selling it at a profit, is conclusive upon its creditors. *Ready v. Smith*, 170 Mo. 163 (70 S. W. Rep. 484). The court say: "In *Parker v. Roberts*, 116 Mo. 662 (22 S. W. Rep. 914), this court said: 'The rule is well settled * * * the creditors of the party defrauded have no right, even though the fraud has the effect to diminish the means of paying them, to look into it and unravel it. It is for him, and him alone, to do so; and if he chooses to acquiesce in the fraud, or suffers himself to be concluded of his right to investigate or undo it, his creditors must be content to abide by the legal rights remaining in him.' And such is the weight of judicial opinion. *Johnson v. Bennett*, 39 Barb. 237; *Garretson v. Kane*, 27 N. J. L. 211; *Bump*, Fraud. Conv. 18; *Priest v. White*, 89 Mo. 610 (1 S. W. Rep. 361); *Graham v. Railroad Co.*, 102 U. S. 148 (26 L. Ed. 106); *Corrugating Co. v. Thatcher*, 87 Ala. 458 (6 So. Rep. 366); *O'Connor Min. & Mfg. Co. v. Coosa Furnace Co.*, 95 Ala. 614 (10 So. Rep. 290; 36 Am. St. Rep. 251); *Whitney v. Kelley*, 94 Cal. 146 (29 Pac. Rep. 624; 15 L. R. A. 813; 28 Am. St. Rep. 106). And the rule obtains with respect to corporations as well as individuals. *Graham v. Railroad Co.*, 102 U. S. 148 (26 L. Ed. 106); *Priest v. White*, 89 Mo. 616 (1 S. W. Rep. 361)."

Sec. 285. What constitutes a fraudulent conveyance.

A mortgage given to secure a bona fide debt, taken by one in good faith, is not rendered fraudulent as to the mortgagor's other creditors by a provision therein allowing the mortgagor to retain possession of the property. *Kidd v. Morris*, 127 Ala. 393 (30 So. Rep. 508). An attorney in proceedings which result in an execution sale of his client's property has no authority to purchase the property for his client, nor is it his duty to do so. With the consent of his client such attorney may purchase the property for himself or take an assignment of the certificate of sale, and, good faith appearing, no presumption of fraud on the client's creditors arises in such a case. *Fisher v. McInerney*, 137 Cal. 28 (69 Pac. Rep. 622; 92 Am. St. Rep. 58). Under Ky. Stat., § 1906 a conveyance taken by one with knowledge of his grantor's intention to defraud his creditors by its execution is void as against them though such grantee paid full consideration. *Huffman v. Leslie*, (Ky.) 66 S. W. Rep. 822 (23 Ky. Law Rep. 1981). To make a conveyance fraudulent as to creditors, within the meaning of W. Va. Code 1899, ch. 74, § 1, declaring that any conveyance made with intent "to delay, hinder, or defraud creditors" shall be void, it is not necessary that the intent be to entirely defraud them out of their debts. If the intent is to either hinder or delay them, or defraud them, by a conveyance which places an obstacle in the way of the prosecution of their legal remedies, it is void under the statute against fraudulent conveyances. A conveyance by a debtor to secure his property from immediate subjection to debts of creditors is a fraudulent act on his part, and as to him void as against them, though honestly made, the debtor intending that his creditors shall be ultimately paid. *Edgell v. Smith*, 50 W. Va. 349 (40 S. E. Rep. 402). Where a judgment against a husband is no lien during his wife's life on her separate estate, on account of his having no estate by curtesy initiate therein, their conveyance of such separate estate can not be fraudulent as to such demand, though such conveyance may have been made with intent to keep the property from being subjected to the husband's debt. *Guernsey v. Lazear*, 51 W. Va. 328 (41 S. E. Rep. 405). A mortgage executed by an insolvent mortgagor upon his crops, etc., and a crop to be grown, which gives the mortgagor the right to consume the property covered thereby in making another crop, does not reserve such a benefit to the mortgagor as will make the mortgage fraudulent and void as to his other creditors. *Kidd v. Morris*,

127 Ala. 393 (30 So. Rep. 508). A conveyance to his brother by one guilty of an assault upon another after his arrest therefor to repay money previously advanced to enable the grantor to escape arrest, in pursuance of an agreement to that effect between them, and to obtain money from the same source with which to defend himself, is not fraudulent as against the assaulted party's claim for damages against the grantor, neither party to the conveyance being aware of the existence of any cause of action against the grantor; but it will be treated as a mortgage to secure such advances as against a judgment for such damages. *Anglin v. Conley*, Ky. (71 S. W. Rep. 926; 24 Ky. Law Rep. 1551). A conveyance of property by an insolvent debtor to a bona fide creditor, who gives him credit for the full value thereof, is not rendered fraudulent as to other creditors because of the fact that such debtor expected that such property would be reconveyed to his children—there being no agreement for such reconveyance. *Hesse v. Barnett*, 41 Or. 202 (68 Pac. Rep. 751).

Sec. 286. Conveyance for support of grantor. A conveyance by an insolvent in consideration of his future support is void so far as it puts the property of the grantor out of the reach of his creditors. *Mallow v. Walker*, 115 Ia. 238 (88 N. W. Rep. 452; 91 Am. St. Rep. 158). A conveyance from a father to his son, when the former is largely in debt, and in consideration of an agreement for the grantor's support, is voluntary, and prima facie fraudulent and void as to then existing creditors. *Spear v. Spear*, 97 Me. 498 (54 Atl. Rep. 1106). A conveyance in consideration of an agreement for the future support of the grantor, is ineffectual as against his creditors, but upon the setting aside of such a deed the grantee is entitled to receive compensation for expenses incurred and services rendered by him in the support of the grantor before the execution of the deed. *Michigan Trust Co. v. Comstock*, 130 Mich. 572 (90 N. W. Rep. 331).

Sec. 287. Conveyance in fraud of marital rights. Where a husband who has abandoned his wife purchases land which he causes to be conveyed to another who pays nothing therefor, the transaction is fraudulent as to his wife's claim for alimony for which she gets a decree in subsequent divorce proceedings. *McFadden v. McFadden*, 134 Ala. 337 (32 So. Rep. 719). The vol-

untary conveyance of land by a husband to his children made pending an action by his wife for divorce, in which she makes a claim for alimony and support, is fraudulent as to her to the extent the property is necessary to the payment of these claims. *Tully v. Tully*, 137 Cal. 600 (69 Pac. Rep. 700). The fact that daughters to whom property had been conveyed by their father permitted him to retain general supervision thereof in the way of collecting rents and payment of taxes is insufficient to show that the conveyance was the result of fraud and collusion between them to defraud his widow. *Phillips v. Phillips*, 30 Colo. 516 (71 Pac. Rep. 363). Where a grantee in a quitclaim deed of a husband's property, executed as security for his debt, and in which his wife joined without knowing the nature of the transaction, conveyed the land to another at the instance of the husband upon the payment of his debt, such latter conveyance is fraudulent as against his wife claiming the property as a purchaser at a subsequent execution sale thereof, under a judgment against the husband for separate maintenance, there being no evidence of payment of consideration by such grantee. *Starr v. Kaiser*, 41 Or. 170 (68 Pac. Rep. 521).

A conveyance by a husband of his real estate, made in consideration of his support, and in which he reserves a life estate, is not invalid as to his wife, although made with the intent to prevent her receiving such property by descent. *Leonard v. Leonard*, 181 Mass. 458 (63 N. E. Rep. 1068; 92 Am. St. Rep. 426). The court say: "The conveyance was an out and out conveyance of the fee subject to a life estate, and consideration was given for it in the support of the grantor. Under such circumstances, apart from special statutes such as governed the decisions in *Littleton v. Littleton*, 18 N. C. 327, 332; *Reynolds v. Vance*, 1 Heisk, 344, 345; *Jiggitts v. Jiggitts*, 40 Miss. 718, the great weight of authority is that the intent to defeat a claim which otherwise a wife might have is not enough to defeat the deed. *Holmes v. Holmes*, 3 Paige, 363; *Stewart v. Stewart*, 5 Conn. 317, 321; *Pringle v. Pringle*, 59 Pa. 281, 285; *Lines v. Lines*, 142 Pa. 149 (21 Atl. Rep. 809; 24 Am. St. Rep. 487); *Padfield v. Padfield*, 78 Ill. 16, 18; *Small v. Small*, 56 Kan. 1, 12, 16 (42 Pac. Rep. 323; 30 L. R. A. 243; 54 Am. St. Rep. 581); *Richards v. Richards*, 11 Humph. 429; *Smith v. Hines*, 10 Fla. 258, 286; *Hatcher v. Buford*, 60 Ark. 169, 180 (29 S. W. Rep. 641; 27 L. R. A. 507); *Williams v. Williams*, (C. C.) 40 Fed. Rep. 521, 522. See *Hays v. Henry*,

1 Md. Ch. 337, 340; *Dunnock v. Dunnock*, 3 Md. Ch. 140, 147. We are of opinion that the deed must be upheld."

Sec. 288. Conveyance in view of prospective marriage.

A voluntary conveyance by a man to his children by a former wife of land he had agreed to deed to another woman if she would marry him, made before the marriage without her knowledge or consent, though recorded before such marriage, is void as against a deed by him of the same land to her, many years thereafter. *Brinkley v. Brinkley*, 128 N. C. 503 (39 S. E. Rep. 38). In a subsequent opinion on the facts of this case, it is held that the deed to the wife does not give her title as against a prior deed by one of the children conveying his undivided interest, made for full consideration to one having no notice of the wife's interest. *Brinkley v. Spruill*, 130 N. C. 46 (40 S. E. Rep. 844). For particular disposition of property made in view of marriage, held to be fraudulent, see *Rice v. Waddill*, 168 Mo. 99 (67 S. W. Rep. 605).

In the case of *Daniher v. Daniher*, 201 Ill. 489 (66 N. E. Rep. 239), in which a particular conveyance by a man to his son two weeks prior to his second marriage was held not to be fraudulent as to the second wife, the court, in discussing this subject, say: "The weight of authority is that a voluntary conveyance by either party to a marriage contract, of his or her real property, made without the knowledge of the other and on the eve of the marriage, is a fraud upon the marital rights of such other, and such conveyance will be treated as fraudulent and void as against the party surprised, and his or her marital rights in the land so conveyed will not be affected thereby. 1 *Scribner on Dower*, ch. 28, sec. 10; *Perry on Trusts*, sec. 213; *Smith v. Smith*, 2 *Halst.* 515; *Swaine v. Perine*, 5 *Johns. Ch.* 482 (9 *Am. Dec.* 318); *Chandler v. Hollingsworth*, 3 *Del. Ch.* 99; *Babcock v. Babcock*, 53 *How. Prac.* 97; *Pomeroy v. Pomeroy*, 54 *How. Prac.* 228; *Youngs v. Carter*, 10 *Hun*, 194; *Petty v. Petty*, 4 *B. Mon.* 215 (39 *Am. Dec.* 501); *Leach v. Duvall*, 8 *Bush.* 201; *Littleton v. Littleton*, 18 *N. C.* 327; *Cranson v. Cranson*, 4 *Mich.* 230 (66 *Am. Dec.* 534); *Brown v. Bronson*, 35 *Mich.* 415; *Jones v. Jones*, 64 *Wis.* 301 (25 *N. W. Rep.* 218); *Thayer v. Thayer*, 14 *Vt.* 107 (39 *Am. Dec.* 211); *Ward v. Ward*, 63 *O. St.* 125 (57 *N. E. Rep.* 1095; 51 *L. R. A.* 858; 81 *Am. St. Rep.* 621); *Butler v. Butler*, 21 *Kan.* 521 (30 *Am. Rep.* 441); *Freeman v. Hartman*, 45 *Ill.* 57 (92 *Am. Dec.* 193); *Clark v. Clark*, 183 *Ill.* 448 (56

N. E. Rep. 82; 75 Am. St. Rep. 115). And some courts have held that the purpose to deceive and defraud the other prospective spouse is imputed to the one who makes the attempted transfer and conceals the fact till after marriage, and that it makes no difference in principle whether actual fraud was intended or not. *Ward v. Ward*, 63 O. St. 125 (57 N. E. Rep. 1095; 51 L. R. A. 858; 81 Am. St. Rep. 621); *Arnegard v. Arnegard*, 7 N. Dak. 475 (75 N. W. Rep. 797; 41 L. R. A. 258). But we think the better rule is that, where any such voluntary conveyance is made without the knowledge of the other of such contracting parties, it presents a prima facie case of fraud, subject to be explained by the parties interested, and the burden is on the grantee to establish the validity of the deed. *Fennessey v. Fennessey*, 84 Ky. 519 (2 S. W. Rep. 158; 4 Am. St. Rep. 210); *Hamilton v. Smith*, 57 Ia. 15 (10 N. W. Rep. 276; 42 Am. Rep. 39); *Champlin v. Champlin*, 16 R. I. 314 (15 Atl. Rep. 85). Not every such voluntary conveyance is in fraud of the rights of the intended spouse. Where the intention is to provide for the children, and not to defraud the wife or husband, and the advancement is reasonable, when considered with reference to the property of the grantor, it will not be held fraudulent. *Fennessey v. Fennessey*, 84 Ky. 519 (2 S. W. Rep. 158; 4 Am. St. Rep. 210); *Baker v. Chase*, 6 Hill, 482; *McIntosh v. Ladd*, 1 Humph. 459; *Richards v. Richards*, 11 Humph. 429; *Miller v. Wilson*, 15 Ohio, 108; *Littleton v. Littleton*, 18 N. C. 327; *Gaines v. Gaines*, 9 B. Mon. 295 (48 Am. Dec. 425); *Clark v. Clark*, 183 Ill. 448 (56 N. E. Rep. 82; 75 Am. St. Rep. 115). A conveyance upon the eve of marriage, to be regarded as a fraud upon the legal rights of the intended wife, must be made without her consent or knowledge. *McClure v. Miller*, 1 Bailey's Eq. 107 (21 Am. Dec. 522); *Leach v. Duvall*, 8 Bush, 201; *Clark v. Clark*, 183 Ill. 448 (56 N. E. Rep. 82; 75 Am. St. Rep. 115). The rule, however, is not absolute. It does not entitle the wife to treat every conveyance made by her husband secretly on the eve of marriage as a fraud on her rights. There may be a good reason for the conveyance. It may be the husband's duty to make it. The general doctrine is that the dower right is subject to every lien or incumbrance, at law or in equity, existing before it attaches. 1 Scribner on Dower, ch. 28, sec. 15. It has been frequently decided that such a conveyance, made for the purpose of carrying out a previous valid contract, is good against a claim of dower. *Chapman v. Chapman*, 92 Va. 537 (24

S. E. Rep. 225; 53 Am. St. Rep. 823); *Burdine v. Burdine*, 98 Va. 515 (36 S. E. Rep. 992; 81 Am. St. Rep. 741); *Champlin v. Champlin*, 16 R. I. 314 (15 Atl. Rep. 85); *Firestone v. Firestone*, 2 O. St. 415; *Oldham v. Sale*, 1 B. Mon. 76; *Beckwith v. Beckwith*, 61 Mich. 315 (28 N. W. Rep. 116)."

Sec. 289. Conveyances between husband and wife.

Although an absolute deed intended as a mortgage executed by a debtor to his wife as security for a debt owing to her is not fraudulent as to his other creditors, they are entitled to have the property applied to the payment of their claims to the extent its value exceeds her claim, by a sale thereof subject to such claim. *Groves v. Steel*, 117 Ia. 701 (89 N. W. Rep. 1107). In Wisconsin it is held that a conveyance by a husband of his interest in his father's estate, made to his wife in consideration of her discontinuing divorce proceedings, has not a sufficient consideration to be valid against his creditors. *Oppenheimer v. Collins*, 115 Wis. 283 (91 N. W. Rep. 690; 60 L. R. A. 406). The mere receipt and appropriation of money by a husband from his wife to which she became entitled from the estates of certain deceased relatives, does not create between them the relation of debtor and creditor unless the money was obtained by him upon his promise made at the time that it should be repaid or secured. *Downs v. Miller*, 95 Md. 602 (53 Atl. Rep. 445). A conveyance of land by a husband to his wife can not be supported, as against his creditors, by her claim of indebtedness against him for the proceeds of property acquired from her father's estate, where such claim has been allowed to stand for more than twenty-five years without notes, interest, or security, or effort to collect or secure it, during which time he had invested the money as his own and secured credit on statements of assets which, from their amount, must have included property which he afterward deeded to her. *Hauk v. Van Ingen*, 196 Ill. 20 (63 N. E. Rep. 705). Construing and applying Ky. Stat., §§ 2353, 2354, providing that a conveyance to one person for a consideration paid by another shall be deemed fraudulent as against the existing creditors of the latter, it is held that a conveyance by an abandoned wife of part of her general estate to the mother of the husband at a time when he was insolvent, in consideration of his obtaining a divorce and surrendering to her the residue of the estate, is fraudulent under the statute, and the property conveyed was subject to the husband's debts. *Deposit Bank v. Rose*, Ky. (69

S. W. Rep. 967; 24 Ky. Law Rep. 732). Where a conveyance from husband to wife is assailed for fraud it is error to instruct the jury that in order to sustain the conveyance the relation of debtor and creditor between them must be shown by the "clearest and most satisfactory evidence." *Hartman & Fehrenbach Brewing Co. v. Clark*, 94 Md. 520 (51 Atl. Rep. 291). In Missouri it is held that where a conveyance of land made by third parties to the wife of an insolvent husband is attacked by his creditors, it will be presumed that the consideration for the conveyance was paid by him, there being no evidence to the contrary. *Halstead v. Mustion*, 166 Mo. 488 (66 S. W. Rep. 258). Where a conveyance of land made to a woman by a third party at the instance of her husband is assailed as fraudulent by his creditors, she has the burden of showing that the consideration did not move from him; and in order to meet this burden she must affirmatively aver in her answer, and clearly and fully show by her evidence, the actual payment of the consideration, in what it consisted, and how it was paid. *Watts v. Burgess*, 131 Ala. 333 (30 So. Rep. 868); *Wimberly v. Montgomery Fertilizer Co.*, 132 Ala. 107 (31 So. Rep. 524). The general rule as to burden of proof, as stated in the first proposition of the above statement, prevails in Kentucky, and has not been abrogated by Laws 1894, p. 176, regulating the property rights of married women. *Sicking v. Fromm*, 112 Ky. 773 (66 S. W. Rep. 760; 23 Ky. Law Rep. 2138). For exhaustive collation of authorities on "Attacks by creditors on conveyances made by husbands to wives," see 90 Am. St. Rep. 497-556. La. Civ. Code, § 2446 construed and applied—validity of conveyance to wife by husband as against his creditors. *Rush v. Landers*, 107 La. 549 (32 So. Rep. 95; 57 L. R. A. 353). For particular conveyances from husband to wife held to be fraudulent as to his creditors, see *Bates v. Drake*, 28 Wash. 447 (68 Pac. Rep. 961); *Farmers' Nat. Bank v. Thomson*, 74 Vt. 442 (52 Atl. Rep. 961); *Downs v. Miller*, 95 Md. 602 (53 Atl. Rep. 445); *Vietor v. Swisky*, 200 Ill. 257 (65 N. E. Rep. 625); *Garr, Scott & Co. v. Stolte*, 115 Ia. 139 (88 N. W. Rep. 334); *Riggs v. Whitaker*, 130 Mich. 327 (89 N. W. Rep. 954); *Orchard v. Collier*, 171 Mo. 390 (71 S. W. Rep. 677); *Needles v. Ford*, 167 Mo. 495 (67 S. W. Rep. 240); *First Nat. Bank v. Fry*, 168 Mo. 492 (68 S. W. Rep. 348); *Balz v. Nelson*, 171 Mo. 682 (72 S. W. Rep. 527). Particular conveyances and transactions between husband and wife held not to be fraudulent as to his creditors. *Kinsey v. Feller*, N. J. Eq. (50 Atl.

Rep. 680); *Blossom v. Negus*, 182 Mass. 515 (65 N. E. Rep. 846); *Smith v. Trefz*, 202 Ill. 587 (67 N. E. Rep. 393); *McCormick Harvesting Mach. Co. v. Griffin*, 116 Ia. 397 (90 N. W. Rep. 84); *Viriden v. Dwyer*, 78 Miss. 763 (30 So. Rep. 45); *Craig v. Conover*, (Ky.) 72 S. W. Rep. 2 (24 Ky. Law Rep. 1682).

Sec. 290. Rights of husband's creditors in crops raised by him on his wife's land or products of their joint efforts. A contract between husband and wife, engaged in farming, that the husband shall work for the wife and act as her agent in what he does, and in payment for such personal services the wife agrees to work for the husband, and it is further agreed that the product of such joint labor shall be the property of the wife, is without consideration, contrary to public policy, and void. And such contract will not sustain a claim of ownership in the wife of a crop sown, grown, and harvested by the husband, as against his creditors. *Dempster Mill Mfg. Co. v. Bundy*, 64 Kan. 444 (67 Pac. Rep. 816; 56 L. R. A. 739). See opinion for discussion of validity of contracts of this character. Applying Ill. Rev. Stat., ch. 68, § 8, providing that neither husband nor wife is entitled to recover any compensation for any labor performed or services rendered for the other, whether in the management of property or otherwise, it is held that where a husband and wife live together on her farm and he contributes personal labor only, such as is consistent with the common interest and the proper enjoyment of the property, the products will not belong to him, or be liable for his debts. *Alsdurf v. Williams*, 196 Ill. 244 (63 N. E. Rep. 686). In Kentucky it is held that property purchased with means accumulated through the industry and skill of a husband in the management of a business conducted by him as agent for his wife, may be subjected to the payment of his debts, although the title be held by her. *Blackburn v. Thompson*, (Ky.) 66 S. W. Rep. 5 (56 L. R. A. 938; 23 Ky. Law Rep. 1723). See *J. E. Hayner & Co. v. McKee*, (Ky.) 72 S. W. Rep. 347 (24 Ky. Law Rep. 1871). A wife's scheme, whereby she acquires certain lands, and resells a portion at an advance, so as to leave her a remaining tract paid for (she being aided in the transaction by the desire of her grantors to provide a home for her), is not a fraud on the creditors of the husband, though he represents the wife in the transaction, and, together with her, signs the purchase-money notes and trust deed, and also alone signs

one of the contracts of purchase, on account of doubts as to the legal effect of the wife's coverture. *Bank of Tipton v. Adair*, 172 Mo. 156 (72 S. W. Rep. 510).

Sec. 291. Rights of persons extending credit to husband to improve his wife's land. Improvements, greatly enhancing its value placed by a solvent husband upon his wife's land with her consent, which consume all of his means and also materials furnished him on credit by third persons, may be subjected to the payment of their claims, where they extended the credit in the belief that he was the owner of the land. *Brand v. Connery*, Mich. (92 N. W. Rep. 784). The court say: "The question, therefore, is, can a person out of debt and solvent expend all his means in improving his wife's property, and thus become insolvent, and leave creditors, who have trusted him for materials to be used in such improvements, without redress? Have such creditors a right by suit in chancery to pursue the property of their debtor, which, with the knowledge and consent of his wife, he has expended in improvements upon her property? Counsel have evidently made diligent search, and find no case directly in point. We also are unable to find any authorities decisive of the question, and must, therefore, decide it upon principle. The case is not within those where there were existing creditors; nor do we think it within the case of *Cole v. Brown*, 114 Mich. 396 (72 N. W. Rep. 247; 68 Am. St. Rep. 491), and authorities there cited, holding that, where there are no existing creditors, the voluntary conveyance of property by a husband to his wife is valid, unless conveyed for the express purpose of defrauding subsequent creditors. It is well established that an existing creditor may follow the improvements made by an insolvent debtor to the premises upon which they have been made by the consent of the wife, and that he has a lien upon them for his debts. *Rose v. Brown*, 11 W. Va. 122, 137, and *Association v. Reed*, 96 Va. 345 (31 S. E. Rep. 514; 70 Am. St. Rep. 858), and authorities there cited. In all the cases cited by counsel for complainants in which the courts have allowed creditors to follow such improvements the debtor was, at the time of making the improvements, insolvent. Such are the cases of *Lathrop v. Gilbert*, 10 N. J. Eq. 344; *Kirby v. Bruns*, 45 Mo. 234 (100 Am. Dec. 376); *Newcomb v. Phillips*, (Ky.) 9 S. W. Rep. 529; *Burt v. Timmons*, 29 W. Va. 444 (2 S. E. Rep. 780; 6 Am. St. Rep. 664); *Thefethen v. Lynam*, 90 Me. 276 (38 Atl. Rep. 335; 38 L. R. A. 190; 60 Am.

St. Rep. 271). Mrs. Connery stood by and permitted her husband to enter into contracts enhancing the value of her property many times. She is several times richer than before. * * * She knew that he was erecting this building as though it were his, though he was in fact erecting it for her. Both are occupying a part of it as a homestead, and living upon the income derived from the other. Both are thus enjoying the benefit of the identical property which was erected in part at the expense of his creditors. The transaction is abhorrent to equity and good conscience. Equity stamps it as fraudulent in fact, though not in intent, and will extend its arm to accomplish justice. The original interest of the wife will be protected."

Sec. 292. Conveyances between near relatives. A conveyance by parents to their child in consideration of his transfer to them of his wages earned during his minority is without consideration as against creditors, without proof of the previous emancipation of the child, and the parents have the burden of proving such emancipation. *Crary v. Hoffman*, 115 Ia. 332 (88 N. W. Rep. 833). A conveyance by a parent to a child in consideration of services justly rendered him will not be deemed fraudulent as to his creditors, unless it is shown that the consideration therefor is inadequate or voluntary, or that it was made with intent to delay, hinder, and defraud the grantor's creditors. *Stuart v. Neely*, 50 W. Va. 508 (40 S. E. Rep. 441). A conveyance, without fraudulent intent, by a solvent man, of lands to his wife, or child, is presumed to have been made in consideration of his moral obligation for the support and maintenance of the grantee, and, in the absence of evidence of a contrary intent, will be upheld against his subsequent creditors. *Hill v. Schmuck*, Neb. (90 N. W. Rep. 928). Where a debtor in failing circumstances organizes a corporation composed of himself and near relatives, and conveys all the assets of his insolvent estate to such corporation, and then, as the alleged managing officer of such corporation, reconveys the same property to another near relative in the name of the corporation, the burden is upon them to show the good faith of the transfers, when they are assailed by creditors. *Lusk v. Rigs*, Neb. (91 N. W. Rep. 243). For case sustaining the same principles, see *Ayres v. Wolcott*, Neb. (92 N. W. Rep. 1036). A conveyance between kinsmen will not be presumed fraudulent as to creditors merely

from proof of the kinship and loss to the creditors. *Redd v. Redd*, (Ky.) 67 S. W. Rep. 367 (23 Ky. Law Rep. 2379). Where a daughter conveys land to her parents with intent to defraud her creditors they will be presumed to take with notice of such intent. *Robson v. Hamilton*, 41 Or. 239 (69 Pac. Rep. 651).

Sec. 293. Voluntary conveyances. A voluntary conveyance is not fraudulent per se as to the grantor's creditors, but the grantee has the burden of repelling the presumption of a fraudulent intent. *Clark v. Thias*, 173 Mo. 628 (73 S. W. Rep. 616). A conveyance in discharge of a moral obligation will be treated as voluntary as against the grantor's creditors. *Davis v. Anderson*, 99 Va. 620 (39 S. E. Rep. 588). Applying Ky. Stat., § 1907, it is held that the validity of a conveyance made in consideration of love and affection can not be sustained as against an existing creditor on the ground that the grantor at the time had other property subject to execution, more than sufficient to pay his debts. *Townsend v. Wilson*, Ky. (71 S. W. Rep. 440; 24 Ky. Law Rep. 1276). A deed for the expressed consideration of "the sum of \$1, and the further consideration that I wish to provide a home for my family," is, as against existing creditors, conclusively voluntary, and void, without regard to intention. *Gunn v. Hardy*, 130 Ala. 642 (31 So. Rep. 443).

In discussing what constitutes a voluntary conveyance, the supreme court of Georgia, in the case of *Martin v. White*, 115 Ga. 866 (42 S. E. Rep. 279), say: "What is a voluntary deed? Mr. Bump says: 'A voluntary conveyance is a conveyance without any valuable consideration. The adequacy of the consideration does not enter into the question. The character of purchase or voluntary is determined by the fact whether anything valuable passes between the debtor and the grantee as a consideration for the transfer. If there is a valuable consideration, no matter how trivial or inadequate, the conveyance is not voluntary.' Bump, *Fraud. Conv.* (4th Ed., Gray) § 238. The supreme court of Connecticut defined a voluntary conveyance to be one that is wholly without a valuable consideration. *Washband v. Washband*, 27 Conn. 424. The supreme court of Pennsylvania held that a conveyance by a father to his daughter for a consideration of \$1 actually paid, and natural love and affection, is not a voluntary conveyance. *Appeal of Ferguson*, 117 Pa. 426 (11 Atl. Rep. 885). Mr. Jones, in his work

on Real Property, says: 'A voluntary conveyance is one wholly without a valuable consideration, or for a valuable consideration which is merely a nominal one.' Volume 1, § 288. In *Ward v. Trotter*, 3 T. B. Mon. 1, it was held that a consideration of \$1 in a deed of trust would be treated, as against creditors, as nominal only; Mr. Chief Justice Boyle saying in the opinion: 'We ascribe no importance to the consideration of one dollar mentioned in the deed. That would indeed be sufficient to pass the legal title as against the grantor, but as against creditors and purchasers it would, were it the only consideration, be deemed merely nominal, and the deed of course would be voluntary, and consequently fraudulent and void as to them. In *Houston v. Blackman*, 66 Ala. 559 (41 Am. Rep. 756), the supreme court of Alabama held that, as against existing creditors, a deed from husband to wife in consideration of love and affection and \$1 was voluntary. In *McKeown v. Allen*, 37 Fla. 490 (20 So. Rep. 556), it is said that the general rule is that a deed with a consideration merely nominal will be considered voluntary as against existing creditors of the grantor. See, also, *Worthington v. Bullitt*, 6 Md. 172; *Scoggin v. Schloath*, 15 Or. 380 (15 Pac. Rep. 635); *Worthy v. Caddell*, 76 N. C. 82; *Ridgeway v. Ogden*, 4 Wash. C. C. 139 (Fed. Cas. No. 11,814); 2 Devl. Deeds (2d Ed.) § 814; Notes to *Hagerman v. Buchanan*, 14 Am. St. Rep. 739 (45 N. J. L. 292; 17 Atl. Rep. 946). In *Felder v. Harper*, 12 Ala. 612, it was held that 'a consideration of \$10 expressed in a deed of gift of two slaves is on its face merely nominal.' In *Ten Eyck v. Witbeck*, 135 N. Y. 40 (31 N. E. Rep. 994; 31 Am. St. Rep. 809), it was held that one who acquires title to valuable property for a merely nominal money consideration, although actually paid, but under circumstances indicating a gift or advancement, is not, within the meaning of the recording act of New York, a purchaser for a valuable consideration, and his deed, although recorded, conveys no title as against a prior unrecorded conveyance of the same property. * * * The final conclusion reached by us is that when a deed expresses upon its face a valuable consideration, no matter how small, it can not be said as a matter of law that such a deed is a voluntary conveyance. Whether a deed which expresses upon its face a trifling and insignificant sum as a money consideration, or one which expresses such a sum and love and affection as the consideration, is either wholly or in part a voluntary conveyance, depends upon the intention of the parties at the time the

conveyance was made; this intention to be derived from the circumstances of the character above alluded to, or any other which may throw light on this question."

Sec. 294. Voluntary conveyances—Record of as constructive notice. Construing and applying Ky. Stat., § 1907, providing that a voluntary conveyance of a debtor "shall be void as to all his then existing liabilities, but shall not, on that account alone, be void as to creditors whose debts or demands are thereafter contracted, nor as to purchasers with notice of the voluntary alienation or charge; and though it be adjudged to be void as to a prior creditor, it shall not therefore be deemed to be void as to such subsequent creditors or purchasers," it is held that the recording of a voluntary conveyance was not constructive notice to a subsequent purchaser for value, and his legal title, acquired without notice of the prior voluntary conveyance, must prevail. *Sewell v. Nelson*, Ky. (67 S. W. Rep. 985; 23 Ky. Law Rep. 2438).

Sec. 295. Preference of creditors. The right to prefer creditors is recognized in Michigan. *Michigan Trust Co. v. Comstock*, 130 Mich. 572 (90 N. W. Rep. 331). A conveyance by an insolvent corporation to a member of its board of directors, based upon a full consideration paid, in the absence of actual fraud, is not void as to its creditors. *Webb v. Rockefeller*, 66 Kan. 160 (71 Pac. Rep. 283). A conveyance by a solvent corporation to some of its directors who are guarantors of some of its notes not yet due, made in consideration of their assuming the payment of such notes, is not fraudulent as to its other creditors, where the value of the property does not exceed the indebtedness. *Swentzel v. Franklin Inv. Co.*, 168 Mo. 272 (67 S. W. Rep. 596). It is held by the supreme court of Indiana that an insolvent manufacturing company does not hold its property in trust for its creditors, or subject to any lien, legal or equitable, in their favor, in any other manner than such property is held by an individual debtor; and such corporation may prefer creditors for whose claims certain directors were surety, or legally bound, although the votes of such directors were necessary to authorize the execution of the instrument creating the preference. *Hadley, J.*, dissenting. *Nappanee Canning Co. v. Reid, Murdock & Co.*, 159 Ind. 614 (64 N. E. Rep. 870; 1115; 59 L. R. A. 199). See conflicting opinions for exhaustive review of authorities on this subject. The case over-

rules the holding of the Appellate Court in the same case as stated in Ballard's Law of Real Prop. Vol. IX, § 318. Ala. Code, § 2158 construed and applied—conveyance to one or more creditors inuring to benefit of all. *Baxley v. Simmons, Durham & Co.*, 132 Ala. 117 (31 So. Rep. 76).

Sec. 296. Property exempt from execution or held in trust. There can be no fraudulent conveyance of property exempt from execution. *Dalrymple v. Security Loan & T. Co.*, 11 N. Dak. 65 (88 N. W. Rep. 1033); *Steiner v. Berney*, 130 Ala. 289 (30 So. Rep. 570); *Michigan Trust Co. v. Comstock*, 130 Mich. 572 (90 N. W. Rep. 331); *Jayne v. Hymmer*, Neb. (92 N. W. Rep. 1019); *Moore v. Wilkerson*, 169 Mo. 334 (68 S. W. Rep. 1035); *Spratt v. Early*, 169 Mo. 357 (69 S. W. Rep. 13). Creditors may set aside a fraudulent conveyance of lands claimed as a homestead to the extent their value exceeds the homestead exemption. *McNair v. Moore*, 64 S. C. 82 (41 S. E. Rep. 829). A parol trust, if clearly established, is a sufficient consideration to support an executed deed against the grantor's creditors. *Columbia Nat. Bank v. Baldwin*, 64 Neb. 732 (90 N. W. Rep. 890). See opinion for exhaustive collation and review of cases on this subject.

Sec. 297. Force and effect of fraudulent conveyance between parties to it. A conveyance fraudulent as to creditors because made with an intent to defraud them, in which the grantee participated, can not be validated by the grantee's subsequent payment of a consideration. *Spuck v. Logan*, 97 Md. 152 (54 Atl. Rep. 989). Equity will not aid either party to a conveyance executed to defraud creditors, but will leave them where it finds them. *Edgell v. Smith*, 50 W. Va. 349 (40 S. E. Rep. 402). A conveyance of property by one about to embark in business in order to prevent the application of the property to the payment of the grantor's debts in case financial misfortune should result from the venture, is a fraud upon creditors; but it passes title to the grantee, and a court of equity will not aid the grantor to regain his property although the feared misfortune did not in fact happen. *Hildebrand v. Willig*, 64 N. J. Eq. 249 (53 Atl. Rep. 1035). Courts will not enforce a parol promise of a grantee taking a conveyance to defraud the grantor's creditors, to reconvey to the grantor, *Brady v. Huber*, 197 Ill. 291 (64 N. E. Rep. 264; 90 Am. St. Rep. 161); but bad faith will not be inferred or pre-

sumed against a grantor who has made a conveyance of his property pending litigation and taken a bond from his grantee for a reconveyance, so as to defeat an action by him to compel a reconveyance. *Stockwell v. Stockwell*, N. H. (54 Atl. Rep. 701).

Sec. 298. Force and effect of fraudulent conveyance between parties to it—Title of fraudulent grantee—Protection of statute of limitations. The title of a grantee taking a conveyance fraudulent as to creditors is not divested by a sale of the property on execution at the instance of a creditor of the grantor; but a judicial action is necessary and it must be brought within the period of limitations allowed for an action to set aside a fraudulent conveyance. *Brasie v. Minneapolis Brewing Co.*, 87 Minn. 456 (92 N. W. Rep. 340; 94 Am. St. Rep. 907). While property held by one under a conveyance made to defraud creditors is subject to the claims of his creditors, the same as any other property to which he has title, until they obtain a lien on the property, his right of alienation is perfect in respect to it, and it is not a fraud upon his creditors for him to reconvey it to his vendor. *Berg v. Frantz*, Ky. (69 S. W. Rep. 801; 24 Ky. Law Rep. 689). Citing, *Bank v. Brady*, 96 Ind. 498; *Bank v. Hostetter*, 61 Ia. 395 (16 N. W. Rep. 289); *Cramer v. Blood*, 48 N. Y. 684; *Davis v. Graves*, 29 Barb. 480; *Powell v. Ivey*, 88 N. C. 256; *Stanton v. Shaw*, 3 Baxt. 12; *Peck v. Jones*, 10 Tex. Civ. App. 335 (30 S. W. Rep. 382); *Bump. Fraud. Conv.* (Gray's 4th Ed.) § 203. The legal title to property alleged to have been transferred with intent to hinder, delay, and defraud creditors is in the fraudulent grantee, the fraudulent character of the transfer not appearing upon its face; and the title continues in such grantee, notwithstanding a sale of the property by a creditor on execution against the grantor, until the fraud is exposed, and the transfer set aside in some judicial proceeding. Such a title is protected by the statute of limitations and becomes absolute and unassailable, unless action for its cancellation be brought within the time allowed by the statute. *Brasie v. Minneapolis Brewing Co.*, 87 Minn. 456 (92 N. W. Rep. 340; 94 Am. St. Rep. 907). The court say: "Transfers of property made for the purpose of hindering and defrauding creditors are not absolutely void. They are only voidable, at the election of the creditors defrauded. While the statutes pronounce such transfers void, the word 'void,' as there used, is construed by all

the courts to mean voidable. 14 Am. & Eng. Enc. Law, 280, and cases cited. They are valid between the parties, and operate to transfer the title to the grantee, subject to being impeached at the suit of creditors. *Spooner v. Insurance Co.*, 76 Minn. 311 (79 N. W. Rep. 305; 77 Am. St. Rep. 651); *Hathaway v. Brown*, 22 Minn. 214. The mere election by the creditor to treat the conveyance as fraudulent and void, by levying upon and selling the property, under execution, can not have the effect of cancelling or annulling it, as a matter of law. The creditor must procure its cancellation in some judicial proceeding instituted for that purpose. As remarked in *Wait, Fraud. Conv.*, 'The seizure of property on execution in cases of this kind subjects the creditor to the peril incident to proving that the transfer was fraudulent.' If the creditor fails to do so, the transfer becomes effectual as to all the world. The logical conclusion, therefore, is that *prima facie* the legal title to property alleged to have been transferred with intent to defraud creditors is in the fraudulent grantee, the fraudulent character of the transfer not appearing on its face; and this continues, notwithstanding a sale of the property by a creditor on execution against the fraudulent grantor, until the fraud is exposed and the transfer set aside. * * * The authorities are very uniform, wherever the question has been presented, to the effect that the title of a fraudulent grantee is protected by the statute of limitations; and if creditors do not, by proper judicial proceedings, effect a cancellation of his title within the statutory period, it becomes final and conclusive. *Bump, Fraud. Conv.* 571; *Porter's Lessee v. Cocke*, Mart. & Y. 264; *Reeves v. Dougherty*, 7 Yerg. 221 (27 Am. Dec. 496); *Blantin v. Whitaker*, 11 Humph. 313; *Lockard v. Nash*, 64 Ala. 385; *Osborne v. Wilkes*, 108 N. C. 651 (13 S. E. Rep. 285). *Strutton v. Young*, (Ky.) 25 S. W. Rep. 109. Nor is the fraudulent grantee precluded from invoking the statute by the fact that he is, in law, held as a trustee for the benefit of creditors; for he is so held against his will. *Musselman v. Kent*, 33 Ind. 452; *Bobb v. Woodward*, 50 Mo. 95; *Sims v. Gray*, 93 Ia. 38 (61 N. W. Rep. 171). This court, in *Lane v. Innes*, 43 Minn. 137 (45 N. W. Rep. 4), recognized the necessity of bringing an action to cancel a fraudulent conveyance after the sale on execution; for it there said, speaking in reference to the different remedies creditors have in such cases, that a judgment creditor may bring an action to remove the obstruction caused by a fraudulent conveyance before selling the property, or 'he

may acquire title by execution sale, and then bring his action.' Of necessity, such an action must be brought, or at least the question as to the fraudulent character of the conveyance must be determined, in some proceeding, and in accordance with the rules of law applicable to all controverted questions. So long as it remains undetermined, the legal title to the property remains in the fraudulent grantee, and becomes final and conclusive after the lapse of six years from the discovery of the fraud by creditors. The question as to the fraudulent character of the conveyance is not a mere incidental fact, but a vital and controlling issue between the contending parties."

Sec. 299. Force and effect of fraudulent conveyance between parties to it—Rights upon setting aside of deed. Upon the setting aside of a conveyance as a fraud on creditors, the grantee is entitled to a lien for an amount paid by him in the satisfaction of a valid incumbrance on the property. *Ackerman v. Merle*, 137 Cal. 169 (69 Pac. Rep. 983). Citing, *Bank v. Halstead*, 134 N. Y. 520 (31 N. E. Rep. 900; 30 Am. St. Rep. 693); *Loos v. Wilkinson*, 113 N. Y. 485 (21 N. E. Rep. 392; 4 L. R. A. 353; 10 Am. St. Rep. 495). The fact that a debtor has made a conveyance of his property which is fraudulent and void as to his creditors does not deprive him of his exemption or homestead rights in the property, upon such conveyance being set aside. *Dulion v. Harkness*, 80 Miss. 8 (31 So. Rep. 416; 92 Am. St. Rep. 563); *Oppenheim v. Myers*, 99 Va. 582 (39 S. E. Rep. 218); *First Nat. Bank v. Reece*, 64 Neb. 292 (89 N. W. Rep. 804). In Missouri it is held that upon the setting aside of a conveyance made by a debtor to his wife it is error to postpone her dower rights to judgment creditors. *Needles v. Ford*, 167 Mo. 495 (67 S. W. Rep. 240).

Sec. 300. Conveyance or mortgage by fraudulent grantee to pay or secure debts of his grantor. One to whom land is conveyed in fraud of creditors may make a valid conveyance in payment or as security for the debt of a creditor who has been defrauded; but a conveyance to a subsequent creditor having notice of the original fraud is invalid. *Rilling v. Schultze*, 95 Tex. 352 (67 S. W. Rep. 401). In support of the first proposition, the court cite: *Boyd v. Brown*, 17 Pick. 453; *Bank v. Cummins*, 39 N. J. Eq. 577; *Murphy v. Briggs*, 89 N. Y. 466; *Copenhaver v. Huffaker*, 6 B. Mon. 18; *Brown v.*

Webb, 20 Ohio, 389; Webb v. Brown, 3 O. St. 246; Beam v. Bennett, 51 Mich. 148 (16 N. W. Rep. 316); Stark v. Ward, 3 Pa. 328; Butler v. White, 25 Minn. 433. A mortgage by a fraudulent grantee executed to a creditor of his grantor having notice of the fraud to secure a debt barred by the statute of limitations, is invalid. Liver v. Thielke, 115 Wis. 389 (91 N. W. Rep. 975).

Sec. 301. Liability of fraudulent grantee taking with notice who appropriates or mortgages the property—Application of rule where the grantee is the wife of the grantor. A conveyance of property, with intention to delay or defraud creditors, and such intention known to the party taking, is void as to them, though made in payment of a debt, which in amount approximates the value of the property so conveyed; and where, in such a case, a wife is the fraudulent grantee of her husband, and, in order to procure a loan to herself, conveys the property, as security, to one ignorant of such fraud, she is personally liable to the judgment creditor of her husband, as to whom the conveyance to her is void, for the amount of the loan, or a sufficiency thereof to satisfy the judgment. Bigby v. Warnock, 115 Ga. 385 (41 S. E. Rep. 622; 57 L. R. A. 754). The court say: "It is a well-established doctrine that a judgment creditor has the right, in equity, to a personal or money judgment against a fraudulent grantee of his debtor, where the grantee has so disposed of the property as to place it beyond the reach of the judgment. 14 Am. & Eng. Enc. Law (2d Ed.) 341; Wait, Fraud. Conv. § 177 et seq.; Bump, Fraud. Conv. § 623; and numerous cases cited by the authors. The reason upon which the rule is founded is well stated in Ferguson v. Hillman, 55 Wis. 181 (12 N. W. Rep. 389), as follows: 'The property in the hands of the fraudulent purchaser is held by him in trust for the creditors of his fraudulent vendor, and when the property is converted into money the money is impressed with the same trust. The original conveyance being void as to creditors, no title as to them ever passed to the grantee; and, if he sells it and receives the money, he must hold the money for the benefit of the creditors. In equity, such money in the hands of the fraudulent grantee is held for the benefit of the creditors.' To same effect, see Blair v. Smith, 114 Ind. 118 (15 N. E. Rep. 817; 5 Am. St. Rep. 593), and Smith v. Sands, 17 Neb. 498 (23 N. W. Rep. 356). Of course, the

recovery against the fraudulent grantee will be limited to the amount of the creditor's judgment against his debtor, and can not exceed the proceeds of the property or its value.

Does this rule apply where the wife is the fraudulent grantee of her husband? The supreme court of the United States, in *Phipps v. Sedgwick*, 95 U. S. 3 (24 L. Ed. 591), which was on appeal from New York, held that it did not. Mr. Justice Miller, in delivering the opinion of the court, said: 'The statutes of the different states have gone very far, in this country, to modify the peculiar relations of husband and wife, as they existed at common law, in reference to their property. But they have not, except, perhaps, in Louisiana, gone so far as to recognize the civil law rule of perfect independence in dealing with each other. While the statutes of New York have recognized certain rights of the wife to deal with and contract in reference to her separate property, they fall far short of establishing the principle that out of that separate property she can be made liable for money or property received at her husband's hands, which in equity ought to have gone to pay his debts. * * * Such a proposition would be a very unjust one to the wife still under the dominion, control and personal influence of the husband.' This case was followed in *Trust Co. v. Sedgwick*, 97 U. S. 304 (24 L. Ed. 954), and *Huntington v. Saunders*, 120 U. S. 78 (7 Sup. Ct. Rep. 356; 30 L. Ed. 580), and these were approved in *Clark v. Beecher*, 154 U. S. 631 (14 Sup. Ct. Rep. 1184; 24 L. Ed. 705). Mr. Wait, in his work on *Fraudulent Conveyances* (3d Ed., § 180), says: 'These supreme court cases certainly accomplish an unfortunate result, and probably will not be universally accepted, if, indeed, the principles they embody are not superseded in some states by the removal of the disabilities incident to coverture. In *Post v. Stiger*, 29 N. J. Eq. 588, it appeared that property had been conveyed to a wife in fraud of the husband's creditors. The wife set up as a defense the fact that she had disposed of it. The court said that she must answer for its value. An attempt was made to show that she had subsequently lost by bad bargains all the property that she had acquired by the conveyance. The proof did not seem to sustain this view, but the court remarked that, even if it had been so proved, this would not relieve her from liability, and, continuing, said: "She held the property as trustee of her husband's creditors, and dealt with it at her peril. A fraudulent grantee can not repel the claims of the creditors of the grantor by

simply saying: 'I have lost, by imprudent bargains or collusive foreclosures, the property I attempted to conceal, and therefore am answerable for nothing.' " It may be urged that this case is a dictum on the points cited. This is probably a legitimate criticism, for the court practically found that the wife still had the property; yet as an expression of an opinion of a highly intelligent court, pointing, as we claim, in the right direction, we regard the dictum as worthy of adoption as an absolute authority.' In *Coale v. Plow Co.*, 134 Ill. 350 (25 N. E. Rep. 1016), it was held: 'Where a wife to whom her husband has fraudulently conveyed land mortgages it to a bona fide mortgagee, and, when the conveyance it attacked by the husband's creditors, claims to own the land, and avows the execution of the mortgage, she will be personally liable to the creditors for the money obtained on the mortgage, though it went to the husband.' In *Jones v. Davenport*, 44 N. J. Eq. 33 (13 Atl. Rep. 652), it was held: 'Where a husband shortly before his death transferred to his wife, who was afterwards his executrix, certain shares of bank stock for an alleged consideration,—\$2,500 less than she realized several months afterwards,—the wife is personally liable to his creditors for the sum which she received from the sale.' In *Blair v. Smith*, 114 Ind. 118 (15 N. E. Rep. 817; 5 Am. St. Rep. 593), it was held: 'Where a husband, to defraud his creditors, gives money to his wife, who yields no consideration, and who accepts the money with knowledge of his fraudulent purpose, she is chargeable as a trustee, and may be compelled to account as such at the suit of the husband's creditors.' It is true that in these cases the point seems not to have been raised that the wife was not personally liable, because she was presumed to have acted under the influence and control of her husband; but, if any such presumption existed in law, surely it would have been noticed by the learned judges who rendered these decisions."

Sec. 302. Rights of subsequent creditors and purchasers. To set aside a conveyance of real estate on the ground that it is fraudulent as to subsequent creditors, such creditor must allege and prove that such conveyance was made with intent to defraud subsequent creditors, and in contemplation of such future indebtedness. *Ayres v. Wolcott*, Neb. (92 N. W. Rep. 1036). Subsequent creditors can only attack or impeach a voluntary deed made by one free from debt by proving actual fraud, and the burden is upon them to show an

actual intent in the minds of the parties at the time of the making of the conveyance to hinder, delay, or defraud creditors. *Kinsey v. Feller*, 64 N. J. Eq. 367 (51 Atl. Rep. 485). The intent to defraud subsequent creditors necessary to avoid a conveyance as to them may be established from the deed itself, and from the acts of the parties and the surrounding circumstances. *Baltimore High Grade Brick Co. v. Amos*, 95 Md. 571 (53 Atl. Rep. 148). A conveyance by a grantor to his surety will not be set aside as fraudulent at the instance of a subsequent purchaser of the property at a sheriff's sale thereof, as the property of the grantor, where it appears that there was no fraud, and that the surety, by paying off the obligations of his principal, had given a full price for the land. *Goodwin v. McMinn*, 204 Pa. St. 162 (53 Atl. Rep. 762).

Sec. 303. Setting aside—Who may maintain the action. In order for a creditor to question a conveyance by his debtor as a fraud on creditors, it must be made to appear that he has been injured thereby. *Anthes v. Schroeder*, (Neb.) 92 N. W. Rep. 196. One having a claim for damages arising out of a tort is a creditor. *Gunn v. Hardy*, 130 Ala. 642 (31 So. Rep. 443); *Bates v. Drake*, 28 Wash. 447 (68 Pac. Rep. 961). A surety is an existing creditor of a cosurety from the date of the execution of the common obligation, and as such is entitled to protection against a fraudulent conveyance made by his cosurety at any time subsequent to the execution of the common obligation; but he can not maintain an action to enforce his right until the demand becomes due and payable. *Washington v. Norwood*, 128 Ala. 383 (30 So. Rep. 405). A receiver of a corporation may sue to set aside its conveyance fraudulent as to its creditors, although valid as against it. *Curtis v. Lewis*, 74 Conn. 367 (50 Atl. Rep. 878). An administrator may bring a suit to set aside a conveyance by his decedent made to defraud creditors. *Mallow v. Walker*, 115 Ia. 238 (88 N. W. Rep. 452; 91 Am. St. Rep. 158). Under the Federal Bankruptcy Act, 1898, § 70, subd. "e", a trustee in bankruptcy may maintain an action in a state court to set aside a conveyance by his bankrupt made to defraud creditors more than six months before the filing of the petition, upon his alleging that the assets in his hands are insufficient to satisfy the claims of creditors. *Mueller v. Bruss*, 112 Wis. 406 (88 N. W. Rep. 229).

Sec. 304. Setting aside—Reducing claim to judgment—Exhausting legal remedies. To entitle one maintaining a joint action on a joint obligation to set aside a fraudulent conveyance by one of the obligors, he must show the insolvency of the co-obligors. *Geiser Mfg. Co. v. Lee*, Ind. App. (66 N. E. Rep. 701). In New Jersey a creditor of a living debtor must have a lien in order to maintain an action to set aside a fraudulent conveyance of land by such debtor, and such a lien is not created by a foreign judgment. *Guy B. Waite Co. v. Otto*, N. J. Eq. (54 Atl. Rep. 425). The general rule requiring one assailing a conveyance as a fraud on creditors to show that he is a judgment creditor or represents a judgment creditor, who has exhausted all his legal remedies, can not be asserted to bar an action in a state court by a trustee in bankruptcy to set aside a conveyance of the bankrupt as a fraud upon creditors whose claims have not been reduced to judgments; the statute (Bankruptcy Act 1898, § 11) providing that all suits founded on a claim from which a discharge would be a release, pending at the time of the petition, are to be stayed until after an adjudication or the dismissal of the petition. *Mueller v. Bruss*, 112 Wis. 406 (88 N. W. Rep. 229). A creditor is not bound to look beyond the jurisdiction of the court in which he seeks to maintain an action to set aside a fraudulent conveyance, for other property of the debtor. *Rohrer v. Snyder*, 29 Wash. 199 (69 Pac. Rep. 748). A return upon execution that no property can be found establishes prima facie the exhaustion of legal remedies. *Oppenheimer v. Collins*, 115 Ia. 283 (91 N. W. Rep. 690; 60 L. R. A. 406). A return of execution nulla bona is conclusive of the question that the creditor has exhausted his legal remedy, and an answer which alleges that the debtor had property subject to levy upon execution, in the absence of an allegation of fraud or collusion on the part of the sheriff, does not state a defense. *Nebraska Nat. Bank v. Hollowell*, 63 Neb. 309 (88 N. W. Rep. 556). Where an execution has been levied upon a fraudulently alienated piece of real estate after a failure to find goods and chattels, the execution creditor is entitled to proceed at once in equity to set aside the fraudulent conveyance and enforce the lien of the execution. *Howard v. Ramers*, 64 Neb. 213 (89 N. W. Rep. 1004). Ky. Stat., § 1907a; Civ. Code, § 439, construed and applied—return of execution nulla bona as prerequisite to action. *Locheim v. Eversole*, (Ky.) 70 S. W. Rep. 661 (24 Ky. Law Rep. 1031).

Sec. 305. Setting aside—Complaint—Parties. A complaint which alleges that the conveyance was made without any consideration and for the purpose of defrauding creditors is sufficient without alleging that the grantee had knowledge of or participated in the fraud. *Nebraska Nat. Bank v. Hollowell*, 63 Neb. 309 (88 N. W. Rep. 556). In Montana a complaint must show that the plaintiff has acquired a lien on the property affected by the alleged fraudulent conveyance. *Wyman v. Jensen*, 26 Mont. 227 (67 Pac. Rep. 114). The complaint must allege that at the time of the conveyance, and when the suit is brought, the debtor did not have enough property, subject to execution, to pay his debts, but this allegation of insolvency is not made out by alleging the issuance of an execution on a judgment in a justice's court and the placing of the same in the hands of a constable who returned it "No property found;" since a constable has no authority to make a levy upon real estate. *Stuckwisch v. Holmes*, 29 Ind. App. 512 (64 N. E. Rep. 894). For particular allegation of complaint on this point held to be sufficient, see *Jackson v. Sayler*, 30 Ind. App. 72 (63 N. E. Rep. 881). Cal. Code Civ. Proc., § 1589 construed and applied—action by administrator—sufficiency of complaint. *Ackerman v. Merle*, 137 Cal. 157 (69 Pac. Rep. 982). It is proper to make strangers to the transaction parties upon an allegation that they claim some interest in or lien on the real estate. *Davis v. Chase*, 159 Ind. 242 (64 N. E. Rep. 88). The grantor in a conveyance sought to be set aside as a fraud on creditors is not an indispensable party where he has parted with all his interest in the property. *Homestead Min. Co. v. Reynolds*, 30 Colo. 330 (70 Pac. Rep. 422).

Sec. 306. Setting aside—Practice. Judgments being liens upon equitable titles, under Ia. Code § 3801, it is not necessary in an action to set aside as a fraud upon their creditors a mortgage given by a partnership on realty conveyed to it as such, to determine whether the partners held a legal or equitable title to the property. *Kelliher v. Sutton*, 115 Ia. 632 (89 N. W. Rep. 26). In actions to set aside conveyances of real estate as fraudulent, as against a creditor claiming under a judgment, proof of such judgment is requisite to maintain such action; and the fact that such judgment was rendered in an action before the same court and judge is not, of itself, ground for dispensing with such proof. *Amundson v. Wilson*, 11 N. Dak. 193 (91 N. W. Rep. 37). See opinion for discussion of how

such judgment may be proved. The reversal of a judgment forming the basis of a creditor's right to maintain an action to set aside his debtor's conveyance as fraudulent, leaves such action without the necessary support and it should be dismissed. *Kudrna v. Ainsworth*, Neb. (91 N. W. Rep. 711). Where a conveyance is made for the purpose of defrauding creditors, the fact that the grantor had property remaining after the conveyance sufficient to satisfy his creditors is not a defense to an action to set aside the conveyance. *Schreck v. Hanlon*, Neb. (92 N. W. Rep. 625); *Townsend v. Wilson*, Ky. (71 S. W. Rep. 440; 24 Ky. Law Rep. 1276). In a suit brought to set aside a fraudulent charge upon real estate when there are valid liens on the land prior to that of the plaintiff in such suit, and the money secured by them is due and payable, the court should ascertain the amount and priorities of such liens, and decree the land to be sold to satisfy said liens as well as that of the plaintiff. *Dent v. Pickens*, 50 W. Va. 382 (40 S. E. Rep. 572). In Indiana, an action to set aside a conveyance as a fraud on creditors can not be maintained unless the debtor has no other property subject to execution, except that sought to be reached. See opinion for particular allegations of complaint on this point held to be sufficient. *Jackson v. Sayler*, 30 Ind. App. 72 (63 N. E. Rep. 881). The privity of a grantee in the fraud of his grantor necessary to make the deed void, under Va. Code, § 2458, is sufficiently alleged by charging that the deed was made, not only without any consideration deemed valuable in law, but with intent to hinder, delay, and defraud the creditors of the grantor. *Flook v. Armentrout's Adm'r*, 100 Va. 638 (42 S. E. Rep. 686).

Sec. 307. Setting aside—Proof of fraud—Burden of proof. In order that a court may pronounce a deed fraudulent per se, the intent to delay, hinder and defraud the creditors of the grantor must appear on the face of the instrument, without reference to extrinsic evidence. *Ballard v. Chewning*, 49 W. Va. 508 (39 S. E. Rep. 170). A conveyance by an insolvent of all his property for a nominal consideration will be treated as a fraud upon his creditors, without proof of actual fraud by the parties to it. *Gustin v. Mathews*, 25 Utah, 168 (70 Pac. Rep. 402). Under Burns' Ind. Rev. Stat., § 6649, fraud is declared to be an ultimate fact necessary to be found, and not be left to inference. *State Bank of Indiana v. Backus*, Ind. App. (66 N. E. Rep. 475). Fraudulent intent, de-

clared to be a question of fact by Neb. Comp. Stat. 1899, ch. 32, § 20, does not differ in kind or degree from other questions of fact; and, when the evidence adduced in a case upon the question of fraudulent intent is so conclusive that reasonable minds can not differ as to the conclusion to be drawn therefrom, it is not error for the court to direct a verdict accordingly. *Bender v. Kingman*, 64 Neb. 766 (90 N. W. Rep. 886). The mere fact that a conveyance assailed as fraudulent was made to a corporation who paid no money therefor, but issued its stock to pay for the property, is not of itself sufficient to prove an intent on the part of the grantors to place the property beyond the reach of creditors, there being a statute authorizing such a corporation to purchase property in this manner. *Homestead Min. Co. v. Reynolds*, 30 Colo. 330 (70 Pac. Rep. 422). The mere payment by a husband, though indebted, but clearly solvent, for lots intended as a permanent home, and conveyed to the wife by his vendor, at his request, or payment by him for building a house thereon, will not alone establish actual fraudulent intent, so as to subject the lots to after-made debts; but these are circumstances to be considered with others upon the question of such intent. *Enslow v. Sliger*, 51 W. Va. 405 (41 S. E. Rep. 173). For particular fact cases in which the evidence was held sufficient to show a conveyance to be fraudulent as to creditors, see *Winslow v. Putnam*, 130 Mich. 359 (90 N. W. Rep. 43); *Goodale v. Wheeler*, 41 Or. 190 (68 Pac. Rep. 753); *Johnson v. Stebbins-Thompson Realty Co.*, 167 Mo. 325 (66 S. W. Rep. 933). For particular fact cases in which the evidence was held insufficient to show that a deed was executed to defraud creditors, see *Reckers v. Allmond*, 29 Wash. 238 (69 Pac. Rep. 734); *Hinkle v. Downing*, 116 Ia. 693 (88 N. W. Rep. 1088); *Behrens v. Steidley*, 198 Ill. 303 (64 N. E. Rep. 1113); *Brown v. Case*, 41 Or. 221 (69 Pac. Rep. 43); *Gleitz v. Schuster*, 168 Mo. 298 (67 S. W. Rep. 561).

The plaintiff has the burden of proving that he is a creditor of the alleged fraudulent grantor, but this fact being established, the grantee has the burden of establishing the good faith of the conveyance. *Russell v. Davis*, 133 Ala. 647 (31 So. Rep. 514; 91 Am. St. Rep. 56). Where the action is prosecuted by a judgment creditor the burden is on defendants to show that the judgment was obtained by fraud. *Johnson v. Stebbins-Thompson Realty Co.*, 167 Mo. 325 (66 S. W. Rep. 933).

Sec. 308. Setting aside—Proof of fraud—Declarations—Withholding instrument from record. The general rule that the declarations of a grantor made after the execution of a grant can not be used to impeach it has been so far modified that, when the good faith of a transfer has been attacked by creditors, and some evidence has been advanced to show a common purpose or design by the parties to hinder, delay, or defraud creditors, subsequent declarations by the grantor are admissible. *Boyer v. Weimer*, 204 Pa. St. 295 (54 Atl. Rep. 21). Declarations made by an alleged fraudulent grantor to the officer taking his acknowledgment at that time showing his intention in the execution of the deed, are admissible. *Robson v. Hamilton*, 41 Or. 239 (69 Pac. Rep. 651).

In Indiana it is held that the mere fact that a deed executed by a husband to his wife to secure a debt to the wife was withheld from record by the latter to preserve the husband's credit, she knowing that her husband was engaged in a hazardous financial business, will not render the deed invalid as against subsequent unsecured creditors who extended credit to the husband on the faith of his supposed ownership of the property, no dishonesty or fraud on the part of the wife being shown to exist; and the fact that such deed was purposely kept off the record with a fraudulent intent, would not vitiate a subsequent mortgage executed by the husband to his wife in good faith, and upon a valuable consideration, although the new mortgage was intended to secure the debt described in the instrument which was never recorded. *State Bank of Indiana v. Backus*, 160 Ind. 682 (67 N. E. Rep. 512); *State Bank of Indiana v. Backus*, Ind. App. (66 N. E. Rep. 475). But in Connecticut,

it is held that a mortgage valid in its inception may become fraudulent as to persons extending credit without knowledge thereof, on account of the mortgagee withholding it from record at the request of the mortgagor; and the fraudulent nature of the mortgage is not cured by a transfer of the mortgage debt and lien by inheritance, or by the substitution of a new mortgage. *Curtis v. Lewis*, 74 Conn. 367 (50 Atl. Rep. 878). See opinion for discussion of this subject.

Sec. 309. Setting aside—Priority of rights between creditors. In West Virginia it is held that a creditor who, after his debtor has made a fraudulent or voluntary conveyance of his real estate, but before any other creditor files his bill in equity to set aside such conveyance, obtains a judgment in a

court of law against such debtor, has a lien, by virtue of his judgment, upon the real estate so conveyed, from the date of the judgment, superior and prior to that of the creditor assailing the deed. When all the creditors assailing a fraudulent or voluntary conveyance are judgment creditors, the lien of each dates from the time he obtained his judgment, and not from the date of the filing of his bill, answer, or petition, attacking the fraudulent or voluntary conveyance, and the priorities among them must be settled according to the dates of their judgments. A creditor at large is not entitled to priority over one who has obtained a judgment against the debtor subsequent to the date of the fraudulent conveyance, but before the filing of the bill by such creditor at large to set it aside, although he is entitled to priority over one who obtains his judgment after the filing of such bill. *Foley v. Ruley*, 50 W. Va. 158 (40 S. E. Rep. 382; 55 L. R. A. 916).

Sec. 310. Loss of creditor's right to assail fraudulent conveyance. Creditors may lose their right to attack a fraudulent conveyance by assent at the time, or subsequent acts recognizing its validity. *Wooten v. Robins*, Ala. (30 So. Rep. 681). The court say: "A fraudulent conveyance is merely voidable, and consequently capable of confirmation, either by assent at the time or by subsequent ratification. As said by Mr. Bump in his work on *Fraudulent Conveyances* (section 456): 'Although a creditor is not a party to a fraudulent transfer, yet he may subsequently elect to confirm it; for any one may dispense with a provision of the law which was made for his own protection. But, before there can be any binding confirmation, he must have notice or knowledge of the facts which constitute the fraud. If he has, however, been guilty of negligence in availing himself of information within his reach, constructive notice may be imputed to him. Mere notice without any action on the part of the creditor, or mere acquiescence by taking no present measures to interfere with the transfer, does not amount to a confirmation; for he can be precluded from assailing the transfer only on the ground of estoppel or agreement. There must be a benefit conferred upon him, or a disadvantage suffered by the grantee, such as can bind the conscience of the former or clothe his act with the character of a contract. * * * But if, with notice of the fraud, either actual or constructive, he makes any agreement upon consideration confirming the transfer, or any statement or

agreement to that effect, upon the faith of which the grantee acts as he would not otherwise do, or under such circumstances that his subsequent assertion of his rights as a creditor, if permitted, would operate as a fraud, he will be held to have confirmed the transfer. The confirmation need not be direct and express, but may be implied from the manner in which the parties deal with the property.' See, also, *Oliver v. King*, 8 De Gex, M. & G. 110; *Phillips v. Wooster*, 36 N. Y. 412; *Beaupre v. Noyes*, 138 U. S. 401; (11 Sup. Ct. Rep. 298; 24 L. Ed. 993); *Freeland v. Freeland*, 102 Mass. 477; *Butler v. Hildreth*, 5 Metc. 49; *Snow v. Lang*, 2 Allen, 18; *Harvey v. Varney*, 98 Mass. 118; *Morgan v. Abbott*, 148 Mass. 507 (20 N. E. Rep. 165); *Warren v. Williams*, 52 Me. 343; *Butler v. O'Brien*, 5 Ala. 316. In *Kahn v. Peter*, 104 Ala. 523 (16 So. Rep. 524), the creditor advised the making of the conveyance and afterwards sought to have it declared fraudulent. He was held to be estopped upon the ground that he had assented to it. Confessedly a subsequent ratification or confirmation of a fraudulent conveyance, with notice or knowledge of all the facts, is the equivalent of an assent or concurrence to its being made in the first instance."

HOMESTEAD.

EPITOME OF CASES.

Sec. 311. Who may claim a homestead. An owner of land living thereon with his widowed mother and single sister is the head of a family, within the meaning of the Arkansas homestead law. *Baldwin v. Thomas*, Ark. (72 S. W. Rep. 53). Construing and applying Ky. Stat., §§ 1702, 1708, 2128, it is held that a married woman living on her own land with her husband and infant children was entitled to a homestead exemption therein. *Herring v. Johnston*, (Ky.) 72 S. W. Rep. 793 (24 Ky. Law Rep. 1940). A daughter, 18 years old, who is living with her father, giving to him her services, is, in legal contemplation, a person dependent upon the father for support, so as to give him a right to claim a homestead under

the constitution of Louisiana, though she may be physically able to earn her own living. *Lyons v. Andry*, 106 La. 356 (31 So. Rep. 38; 55 L. R. A. 724; 87 Am. St. Rep. 299). A married woman whose husband lives in another country and visits her at intervals of two or three years and occasionally makes small remittances of money to her, can not claim a homestead in property owned and occupied by her as a "householder or head of a family," under Va. Code, § 3630, all of their children being grown and not dependent upon her for support. *Oppenheim v. Myers*, 99 Va. 582 (39 S. E. Rep. 218). For an extended discussion of the nature of the right of homestead in lands in North Carolina, see *Joyner v. Sugg*, 131 N. C. 324 (42 S. E. Rep. 828).

Sec. 312. In what lands a homestead may be claimed
—**Shifting from one tract to another.** The homestead rights given by Mo. Gen. Stat. 1865, p. 450, § 7, attach to estates existing at the time the law went into effect, as against after-contracted debts. *Clark v. Thias*, 173 Mo. 628 (73 S. W. Rep. 616). Under Wis. Rev. Stat., § 2983, a homestead may be secured in premises held under a lease. *Beranek v. Beranek*, 113 Wis. 272 (89 N. W. Rep. 146). A house rented out by a debtor can not be claimed as a homestead, although on the lot on which his residence is located and the value of both do not exceed the statutory (Ky. Stat., § 1702) limit of homesteads. *Garrison v. Penn*, (Ky.) 66 S. W. Rep. 14 (23 Ky. Law Rep. 1775). In Texas it is held that a homestead right may be predicated upon a bare right of possession, without any other title. *American Nat. Bank v. Cruger*, 31 Tex. Civ. App. 17 (71 S. W. Rep. 784). See *Birdwell v. Burleson*, 31 Tex. Civ. App. 31 (72 S. W. Rep. 446). Lands purchased and used for a homestead do not lose their character as such on account of title being taken in the wife's name. *Rouse v. Caton*, 168 Mo. 288 (67 S. W. Rep. 578; 90 Am. St. Rep. 456). The interest of a tenant in common of lands occupied as a homestead is sufficient to give him homestead rights therein which may also extend to contiguous lands owned solely by the claimant and used in connection with the estate in common. *Clark v. Thias*, 173 Mo. 628 (73 S. W. Rep. 616). Oral division by executors of land, which they were directed by will to divide among the devisees, is a sufficient severance of the devisees' tenancy in common to invest one of them with separate title to his share,

so as to bring it within the homestead law. *McBroom v. Whitefield*, 108 Tenn. 422 (67 S. W. Rep. 794).

Iowa Code, 1897, § 2981, allowing a change of homesteads without loss of the right of exemption, does not give a homestead character to property purchased with money borrowed by mortgaging a homestead. *Boettger v. Galloway*, 115 Ia. 353 (88 N. W. Rep. 831). For further construction of this statute, see *Richards v. Orr*, 118 Ia. 724 (92 N. W. Rep. 655). A statute (Mo. Rev. Stat. 1899, §§ 3622, 3623), exempting a homestead acquired with the proceeds of a sale of a prior homestead, does not have any extraterritorial force and does not exempt as a homestead land acquired with the proceeds of a sale of a homestead in another state. *State Bank of Eagle Grove v. Dougherty*, 167 Mo. 1 (66 S. W. Rep. 932; 90 Am. St. Rep. 422). Under this statute a town house acquired through a mortgage of homestead lands may be claimed as a homestead where the claimant moves into it and abandons his farm homestead. *Rose v. Smith*, 167 Mo. 81 (66 S. W. Rep. 940).

Sec. 313. Occupancy and use necessary. The occupancy of premises by one having an undivided interest therein, under a lease of the whole making him a tenant at will, is not such as will create a right of homestead. *Rank v. Garvey*, Neb. (92 N. W. Rep. 1025). In order for a debtor to establish a homestead right in lands adjoining those upon which he lives, he must show a homestead in the latter. *Howard v. Raymers*, 64 Neb. 213 (89 N. W. Rep. 1004). The mere depositing of dirt upon a lot, to fill depressions, is not such an act of preparation as would, in connection with intention, give it the homestead character. *Churchwell v. Sweeney*, 29 Tex. Civ. App. 166 (68 S. W. Rep. 185). Under Kan. Const., art. 15, § 9, exempting a homestead when "occupied as a residence by the family of the owner," it is held that a homestead claimant whose wife is dead, and whose children have grown to maturity and moved away and ceased their dependence on him, and no longer constitute part of his family, and who has no one else associated with him in the family relation, can not continue to retain the homestead exemption. *Ellinger v. Thomas*, 64 Kan. 180 (67 Pac. Rep. 529). Although property exempt from execution as a homestead is declared by the constitution of Louisiana to be property "bona fide owned" by debtor and "occupied" by him, a right of homestead once existing is not

conditioned upon continued and continuous residence upon the homestead property. Nonresidence does not carry with it per se a forfeiture of the right, but that fact may be "evidence" of an intention to abandon, which, when coupled with others, may establish it. Each case on this subject must be determined by its own special facts and circumstances. *Lyons v. Andry*, 106 La. 356 (31 So. Rep. 38; 55 L. R. A. 724; 87 Am. St. Rep. 299). In Missouri it requires both ownership and occupancy to constitute a homestead, and no head of a family can have two homesteads at the same time; neither can husband and wife, while living together, each have a separate homestead at the same time. *Rouse v. Caton*, 168 Mo. 288 (67 S. W. Rep. 578; 90 Am. St. Rep. 456). Mere intention to establish a homestead on a tract of land is not sufficient, under Mo. Rev. Stat., § 3616. There must be some visible occupancy and appropriation of the land to homestead purposes. *Feurt v. Caster*, 174 Mo. 289 (73 S. W. Rep. 576). Before a homestead right attaches to land, under N. Dak. Rev. Codes, § 3605, there must be actual or constructive residence on the land, with a view to making it a home. Mere intention to occupy such land is not sufficient, in the absence of some acts indicative of carrying such intention into immediate execution to some extent. See opinion for particular facts held not to create a right of homestead in land. *Brokken v. Baumann*, 10 N. Dak. 453 (88 N. W. Rep. 84). In support of the last proposition, the court cite: *Swenson v. Kiehl*, 21 Kan. 533; *Scofield v. Hopkins*, 61 Wis. 374 (21 N. W. Rep. 259); *Woodbury v. Warren*, 67 Vt. 251 (31 Atl. Rep. 295; 48 Am. St. Rep. 815); *Evans v. Calman*, 92 Mich. 427 (52 N. W. Rep. 787; 31 Am. St. Rep. 606); *Ingels v. Ingels*, 50 Kan. 755 (32 Pac. Rep. 387); *Davis v. Kelly*, 62 Neb. 642 (87 N. W. Rep. 347).

Sec. 314. Amount of land claimed. In Alabama, when the homestead is in a city, town, or village, the limitation in the constitution and statutes relates to the value, and not the number and extent, of the lots, or the uses to which they are put. *Marx v. Threet*, 131 Ala. 340 (30 So. Rep. 831). The fact that a distinct part of a town lot claimed by a debtor as his homestead is a store room in which he conducts a mercantile business and lives in his residence on the other part of the lot, does not bar his including such part in his homestead; nor is such a result effected by his conveyance of the store room part to his wife, or their giving a mortgage on the other part in which she re-

linquishes her homestead rights. *Berry v. Meir*, 70 Ark. 129 (66 S. W. Rep. 439). To limit a homestead to one-half acre, under Ia. Code, § 1996, it must lie not only within the limits of a municipality, but within the platted portion thereof, and be itself platted; and the mere platting of rural lands subsequently included in a city by the extension of its limits, by the auditor, under § 569, for convenience in assessing, does not bring them within the statute. *Parrott v. Thiel*, 117 Ia. 392 (90 N. W. Rep. 745). A statute (Utah Laws 1896, p. 215, amending 2 Comp. Laws 1888, p. 308, § 3429), increasing the amount of homestead exemption, applies to the remedy only and is not unconstitutional as impairing previous contractual rights. *Folsom v. Asper*, 25 Utah, 299 (71 Pac. Rep. 315).

Sec. 315. Selection, allotment and declaration of homestead. In Illinois it is held that a purchaser at execution sale of the debtor's real estate worth more than the value of his homestead may, when such homestead is not set off by the sheriff to the debtor, maintain a bill in equity to have such interest set off, or to pay the debtor the value thereof in cash. *Krupp v. Brand*, 200 Ill. 403 (65 N. E. Rep. 780). Under Sand. & H. Ark. Dig., §§ 3714, 3718, the right of homestead is a personal privilege to be availed of by the debtor or his wife in accordance with the terms of the statute. *Jones v. Dillard*, 70 Ark. 69 (66 S. W. Rep. 202). Ga. Civ. Code, § 2866 construed and applied—proceedings to acquire homestead. *Piedmont Nat. Bldg. & Loan Ass'n v. Bryant*, 115 Ga. 417 (41 S. E. Rep. 661). Ia. Code, § 2979, as amended by Laws 27th Gen. Assem., ch. 98, construed and applied—sale on execution—platting of homestead—notice by officer. *Ackerman v. Hendricks*, 117 Ia. 106 (90 N. W. Rep. 522). Miss. Code 1892, §§ 1972, 1976 construed and applied—declaration of homestead. *Nixon v. Hewes*, 80 Miss. 88 (31 So. Rep. 899). The selection of a homestead by an execution debtor, under 2 Utah Comp. Laws 1888, p. 308, § 3429, may be made after levy of execution, any time before sale, and need not include the home place of the family. *Folsom v. Asper*, 25 Utah, 299 (71 Pac. Rep. 315). Hill's Wash. Code, § 481; 2 Bal. Ann. Wash. Codes & Stat., §§ 5244-5246, construed and applied—selection and declaration of homestead. *In re Feas' Estate*, 30 Wash. 51 (70 Pac. Rep. 270).

Sec. 316. Exemption of homestead from debts. Crops growing upon land exempt as a homestead are also exempt from execution or attachment. *Moore v. Graham*, 29 Tex. Civ. App. 235 (69 S. W. Rep. 200). In Arkansas a judgment is not a lien on the homestead of the judgment debtor including the dwelling house or home and such contiguous land, as he or his wife may select, not exceeding \$2,500 in value. *Jones v. Dillard*, 70 Ark. 69 (66 S. W. Rep. 202). The claim of the board of commissioners of a state asylum, which it may enforce against the estate of a patient therein for his board, under Ky. Stat., 257, is not a debt for which the homestead of a deceased patient can be sold, under § 1707, subject to the occupancy of his widow and infant children. *Holburn v. Pfanmiller's Adm'r*, Ky. (71 S. W. Rep. 940; 24 Ky. Law Rep. 1613). Exemption laws are not given an extra-territorial operation; hence it is held in Kentucky that property claimed as a homestead is not relieved from the liability imposed by Stat., § 1702, for the previous debts of the claimant, by reason of its having been purchased with money brought from another state and which was the proceeds of property exempt under the laws of that state; to have such an effect, such proceeds must be exempt under the laws of Kentucky. *Wickwire v. Zeller*, (Ky.) 68 S. W. Rep. 630 (24 Ky. Law Rep. 421). For further construction of this statute, see *Andrews v. Kentucky Citizens' Bldg. & Loan Ass'n's Assignee*, (Ky.) 67 S. W. Rep. 826 (23 Ky. Law Rep. 2453). Mo. Rev. Stat. 1879, § 2695, as amended by Laws 1887, p. 198, construed and applied—Exemption of homestead from debts. *Spratt v. Early*, 169 Mo. 357 (69 S. W. Rep. 13).

Sec. 317. Debts for which a homestead is liable. In Alabama a homestead is not exempt against a judgment for unlawful use and occupancy of land, not originating in contract. *Gunn v. Hardy*, 130 Ala. 642 (31 So. Rep. 443). Although in Georgia land bought with the proceeds of a homestead is homestead property, and ordinarily stands, as to exemptions from sale, on the same footing as the original homestead, this is not true as against the rights of one who, bona fide and for value, acquires a lien on such land, without knowledge, either actual or constructive, of its homestead character. *Walden v. A. P. Brantley Co.*, 116 Ga. 298 (42 S. E. Rep. 503). A judgment for alimony in favor of the wife rendered in an action for divorce against the husband is a lien upon the family homestead,

the title whereof is in the husband. *Fraaman v. Fraaman*, 64 Neb. 472 (90 N. W. Rep. 245), following *Best v. Zutavern*, 53 Neb. 604 (74 N. W. Rep. 64), and citing, *Brandon v. Brandon*, 14 Kan. 342; *Blankenship v. Blankenship*, 19 Kan. 159; *Mahoney v. Mahoney*, 59 Minn. 347 (61 N. W. Rep. 334); *Daniels v. Morris*, 54 Ia. 369 (6 N. W. Rep. 532). Construing and applying Mo. Gen. Stat. 1865, p. 450, § 7, making a homestead liable for debts existing "at the time of the acquiring such homestead," and fixing such time at the date of the filing for record of the deed to the homestead, it is held that a homestead is liable for debts contracted after a deed therefor was obtained and the premises occupied, but before the deed was recorded. *Clark v. Thias*, 173 Mo. 628 (73 S. W. Rep. 616). Applying Mo. Rev. Stat. 1889, § 5441, making a homestead liable for debts accruing before the deed to the homestead is recorded, it is held that a homestead is subject to a judgment taken on a note given after the acquisition of a homestead, in settlement, but not in satisfaction, of an account of indebtedness incurred before the homestead was acquired. *Holland v. Rongey*, 168 Mo. 16 (67 S. W. Rep. 568).

Sec. 318. Abandonment, loss or waiver of homestead.

That a creditor unsuccessfully contested the right of his debtor to a homestead in the property sought to be set apart does not estop him from setting up a waiver by the debtor of the benefit of the homestead. *Hendrix v. Webb*, 113 Ga. 1028 (39 S. E. Rep. 461). One who has acquired a right to a homestead on account of being the head of a family does not lose such right by the breaking up of the family by death. *Baldwin v. Thomas*, Ark. (72 S. W. Rep. 53). Where the persons entitled to claim a homestead right in lands are parties to proceedings adversary in their character, which result in a sale of the homestead, and have an opportunity to assert the homestead right but fail to do so, it will be deemed waived. *Curtis v. D. M. Osborne & Co.*, 63 Neb. 837 (89 N. W. Rep. 420). Although it may operate to avoid a statute (Wis. Rev. Stat., § 2203) prohibiting the alienation or incumbrance of a homestead, except by instrument in which the wife joins, the husband may by his abandonment and removal from lands occupied as a homestead relinquish the homestead therein, even though she refuses to move. *Beranek v. Beranek*, 113 Wis. 272 (89 N. W. Rep. 146). Citing, *Thomp. Homest. & Ex.* §§ 276-483; *Wap. Homest.* p. 582, § 7; *Hand v. Winn*, 52 Miss.

788; *Brown v. Coon*, 36 Ill. 243 (85 Am. Dec. 402); *Burson v. Dow*, 65 Ill. 146; *Stewart v. Mackey*, 16 Tex. 56 (67 Am. Dec. 609); *Slavin v. Wheeler*, 61 Tex. 654; *Guiod v. Guiod*, 14 Cal. 506 (76 Am. Dec. 440). See *Blumer v. Allbright*, 64 Neb. 249 (89 N. W. Rep. 809). 2 Bal. Ann. Wash. Codes & Stat., § 5220 construed and applied—declaration of abandonment. In *re Feas' Estate*, 30 Wash. 51 (70 Pac. Rep. 270). For particular fact cases illustrative of what constitutes an abandonment of a homestead, see *Slattery v. Keefe*, 201 Ill. 483 (66 N. E. Rep. 365); *Smith v. Kneer*, 203 Ill. 264 (67 N. E. Rep. 780); *Holmes v. Nichols*, 93 Mo. App. 513 (67 S. W. Rep. 722); *Alexander v. Lovitt*, 95 Tex. 661 (69 S. W. Rep. 68).

Sec. 319. Abandonment by removal. A temporary removal from a homestead with the intention of a speedy return, does not constitute an abandonment. *Burkhardt v. James Walker & Son*, Mich. (92 N. W. Rep. 778). One leasing his homestead and removing therefrom for the benefit of his health with the intention of returning if his health is not benefitted does not thereby abandon his homestead. *Palmer v. Riddle*, 197 Ill. 45 (64 N. E. Rep. 263). Where the abandonment is temporary, and with specific intent to return at some future time, the length of the period being dependent on future conditions, the homestead is not lost. *Rand Lumber Co. v. Atkins*, 116 Ia. 242 (89 N. W. Rep. 1104). A temporary removal from a country homestead to the city to furnish children with educational advantages is not an abandonment of the homestead. *Herring v. Johnston*, (Ky.) 72 S. W. Rep. 793 (24 Ky. Law Rep. 1940). In Nebraska it is held that a departure from the homestead for the purposes of business, pleasure, or health does not constitute an abandonment thereof, unless coupled with such departure is the intention not to return; and the wife can not be deprived of her homestead right unless she participated in the intention not to return. *Blumer v. Allbright*, 64 Neb. 249 (89 N. W. Rep. 809). In the opinion in this case the court emphatically disapproves the rule obtaining in some jurisdictions that the husband may by exercising his right to change his domicile effect a relinquishment of the homestead without the consent of his wife. One removing from a farm homestead to a town and there engaging in pursuits much more profitable does not retain his homestead by a mere indefinite intention to return. *White v. Roberts*, 112 Ky. 788 (66 S. W. Rep. 758; 23 Ky. Law. Rep. 2187). An abandonment of a

homestead in land results from the claimant renting the same for a series of years and removing therefrom without reserving any part of the dwelling for use as his residence and without filing a claim of homestead, as provided by Ala. Code, § 2065. *Bland v. Putman*, 132 Ala. 613 (32 So. Rep. 616). For a discussion of the principles governing the abandonment of a homestead by removal, see *Wapello County v. Brady*, Ia. (92 N. W. Rep. 717).

Sec. 320. Conveyance and incumbrance of homestead.

In Iowa the husband may convey the homestead direct to his wife. *Beedy v. Finney*, 118 Ia. 276 (91 N. W. Rep. 1069). Constitutional and statutory requirements as to the conveyance of a homestead do not prevent the acquisition of rights in land held as a homestead through an equitable estoppel arising from acts of the owner. *Hendrix v. Southern Ry. Co.*, 130 Ala. 205 (30 So. Rep. 596; 89 Am. St. Rep. 27). In Missouri it is held that the unexercised right of a husband to alienate or incumber an existing homestead, subject to the wife's inchoate right of dower, without the wife joining with him, except where the wife had filed her claim, as provided by Rev. Stat. 1889, § 5435, is a vested right which can not be impaired by a subsequent statute (Act of 1895) enacting that "the husband shall be debarred from and incapable of selling, mortgaging or alienating the homestead in any manner whatever and every such sale, mortgage or alienation is hereby declared null and void." *Gladney v. Snyder*, 172 Mo. 318 (72 S. W. Rep. 554; 60 L. R. A. 880; 95 Am. St. Rep. 517). See opinion for exhaustive discussion of this subject. A mortgage executed by a husband and wife on their homestead to secure his debt may be kept alive against her, as against the running of the statute of limitations, by payments made on the debt by him. *Roberts v. Roberts*, 10 N. Dak. 531 (88 N. W. Rep. 289).

Sec. 321. Conveyance and incumbrance of homestead

—Necessity of joint conveyance of husband and wife—
Statutes construed. Government lands occupied by a married man and his family, under a certificate of homestead entry, which they improve, cultivate and claim as a homestead, will be regarded as his homestead pending the time from entry to the time of procuring the patent, and a conveyance to a railroad company of a right of way over such land during such time, is void unless signed by both husband and wife and

separately acknowledged by her, as required by Ala. Code, § 2034. *Griffin v. Chattanooga S. R. Co.*, 127 Ala. 570 (30 So. Rep. 523; 85 Am. St. Rep. 143). Ala. Code, § 2034 construed and applied—sufficiency of certificate of wife's acknowledgment of conveyance of homestead. *Penny v. British & American Mortg. Co.*, 132 Ala. 357 (31 So. Rep. 96); *Marx v. Threet*, 131 Ala. 340 (30 So. Rep. 831). In Arizona a mortgage of the homestead of a married man not joined in by his wife is not enforceable even as against any excess in value of the mortgaged lands above the statutory amount of homestead. *Edwards v. Simms*, Ariz. (71 Pac. Rep. 902). Under Sand. & H. Ark. Dig., § 3713, a conveyance of a homestead by a husband in which his wife does not join is invalid, although the grantor reserves the right of possession and rents and profits during his life, but makes no reservation of his wife's interest. *Park v. Park*, Ark. (72 S. W. Rep. 993). In California a mortgage of the homestead executed by the husband alone before the filing of the declaration of homestead, is valid as against his wife's claims therein. *Lowenthal v. Coonan*, 135 Cal. 381 (67 Pac. Rep. 324; 87 Am. St. Rep. 115). In Illinois the release of the homestead in a mortgage is ineffectual when the acknowledgement thereof is taken before an officer disqualified to act, but this fact does not invalidate the mortgage except as to the homestead, where its execution is proven by other evidence. *Ogden Bldg. & L. Ass'n v. Mensch*, 196 Ill. 554 (63 N. E. Rep. 1049; 89 Am. St. Rep. 330). In Iowa a mortgage executed by the husband alone conveying only the homestead on which he resides with his family is void. *Way v. Scott*, 118 Ia. 197 (91 N. W. Rep. 1034). A contract to convey a homestead is good though signed by the wife subsequent to the execution by the husband. *Epperly v. Ferguson*, 118 Ia. 47 (91 N. W. Rep. 816). The fact that a deed is invalid as a conveyance of a homestead because not joined in by the wife, as required by Ia. Code, § 2974, does not affect its validity as to other property included in it. *Pryne v. Pryne*, 116 Ia. 82 (89 N. W. Rep. 108). The joint consent of husband and wife to the alienation of their homestead, required by the Kansas constitution, need not be in writing, but may be evidenced by acts in pais, showing a concurrence between them in point of time and intent to the alienation. See opinion for application of this rule to particular facts. *Sullivan v. City of Wichita*, 64 Kan. 539 (68 Pac. Rep. 55). Applying Ky. Stat., § 1706, providing that no mortgage, release, or waiver of

homestead exemption shall be valid unless same be in writing, subscribed by debtor and his wife, and acknowledged and recorded in the same manner as conveyances of real estate. it is held that a mortgage void on account of the wife's mental incapacity at the time of its execution is also void as to the husband. *Ballinger v. Lester*, Ky. (67 S. W. Rep. 266; 23 Ky. Law Rep. 2353). A mortgage of the homestead signed by the wife, but in the body of which her name does not appear, does not create any lien or protect the mortgagee as to improvements subsequently added, unless they increase the value of the homestead beyond the statutory limit. *Massillion Engine & Thresher Co. v. Carr*, (Ky.) 71 S. W. Rep. 859 (24 Ky. Law Rep. 1534). Under Miss. Code 1892, § 1983, a conveyance of the homestead by a husband is not valid or binding unless signed by his wife, *Johnson v. Hunt*, 79 Miss. 631 (31 So. Rep. 205). The Nebraska statutory provisions for the conveyance or incumbrance of the homestead are exclusive. *Buettgenbach v. Gerbig*, (Neb.) 90 N. W. Rep. 654. Under Neb. Comp. Stat. 1899, ch. 36, § 4, a conveyance of the homestead without the acknowledgment of the wife is absolutely void, although it has been signed by her. *Blumer v. Allbright*, 64 Neb. 249 (89 N. W. Rep. 809). Estoppel can not supply the statutory requirements of signature and acknowledgment to the incumbrance of a homestead, where these are wanting. *Davis v. Thomas*, Neb. (92 N. W. Rep. 187). Where a husband and wife are occupying premises as a homestead, held by either under a contract of purchase, the contract can not be assigned, so as to create a lien upon the premises, except by an instrument executed and acknowledged by both husband and wife. *Rawles v. Reichenbach*, Neb. (90 N. W. Rep. 943). A mortgage given to secure part payment of the purchase price of a homestead, or an agreement for its extension, need be signed only by the one taking the title. *Irwin v. Gay*. (Neb.) 91 N. W. Rep. 197. An oral agreement between a son and his parents that, upon the death of both the latter, he shall become vested with the title of the family homestead in consideration of his carrying on the business of the parents, and providing them during their lifetime with a home and maintenance, is held to be testamentary in character, and not a violation of the Nebraska statute regulating the alienation of homesteads. Such an agreement shown to have been fairly and honestly made and substantially performed by the son may be specifically enforced after the death of the parents; and he

may have equitable relief during their lifetime against one to whom they convey in violation of the agreement, but who has notice of the agreement. *Teske v. Dittberner*, Neb. (91 N. W. Rep. 181). N. C. Const., art. 10, § 8 construed and applied—conveyance of homestead by husband without wife's signature. *Cawfield v. Owens*, 130 N. C. 641 (41 S. E. Rep. 891). The provisions of S. C. Const. 1895, art. 3, § 28, requiring a conveyance or mortgage of homestead to be executed by both husband and wife, do not apply to homesteads assigned before the adoption of the constitution. *Ex parte Jeter*, 64 S. C. 405 (42 S. E. Rep. 196). Applying Tenn. Const., art. 11, § 11, and Shannon's Code, § 3798, it is held that an infant wife joining in a deed to a homestead may render it ineffectual by her subsequent disaffirmance. *McBroom v. Whitefield*, 108 Tenn. 422 (67 S. W. Rep. 794). In Texas it is held that a husband alone can not contract with a railroad company empowering it to use water from a spring located on his homestead, and to enter upon his homestead to erect necessary pumping works. *Houston & T. C. Ry. Co. v. Cluck*, 31 Tex. Civ. App. 211 (72 S. W. Rep. 83). In the absence of notice, a purchaser of a note given for purchase money in an apparent sale of the homestead, or a purchaser or subsequent mortgagee of the property itself, is entitled to protection against the claim of the wife that the transaction was really an attempt to mortgage the property under the form of a sale, in violation of Tex. Const., art. 16, § 50. *Graves v. Kinney*, 95 Tex. 210 (66 S. W. Rep. 293). Under Vt. Rev. Laws 1880, ch. 95, § 1904 it is held that a husband's mortgage of the homestead in which his wife does not join is void in its inception, and is not validated by her subsequently dying and leaving him without family. *Martin v. Harrington*, 73 Vt. 193 (50 Atl. Rep. 1074; 87 Am. St. Rep. 704). Wis. Rev. Stat., § 2203, rendering invalid any alienation of a homestead by a married man without his wife's signature, forbids his extinguishing a homestead in premises held under a lease for a term of years, by his assignment or surrender of the lease by writing in which she did not join. *Beranek v. Beranek*, 113 Wis. 272 (89 N. W. Rep. 146). The wife's separate acknowledgment of a mortgage of the homestead, as required by Wyo. Rev. Stat., § 2770, is essential to its validity. *First Nat. Bank v. Citizens' State Bank*, Wyo. (70 Pac. Rep. 726). Wyo. Rev. Stat., § 2784, declaring void every conveyance or incumbrance of homestead by a married man unless his wife "shall, separate and apart from her

said husband, freely and voluntarily sign and acknowledge the instrument," does not render void such an instrument in fact so signed and acknowledged, on account of the failure of the officer's certificate to expressly state that the wife was examined "separate and apart from her husband." *Adams v. Smith*, Wyo. (70 Pac. Rep. 1043). See opinion for exhaustive discussion of this subject. For exhaustive collation of authorities on "The effect of a conveyance or incumbrance of the homestead by one only of the spouses," see 95 Am. St. Rep. 909-944.

Sec. 322. Conveyance and incumbrance of homestead—Necessity of joint conveyance of husband and wife—"Oil lease" construed to be a conveyance. A contract, although denominated an "oil lease," whereby a husband conveys all the oil, gas, coal and other minerals under the homestead of himself and wife, with the right to the purchaser at all times to enter upon the homestead tract for the purpose of drilling for oil, gas, coal, and other minerals, and to conduct all other operations, and lay all pipes necessary for the production and transportation of all the oil produced and saved from said premises, reserving to himself one-tenth of the oil so produced and saved, for a period of five years, with the right of indefinite renewal by payment of a specified rental, is a conveyance within the meaning of *Batts' Ann. Tex. Civ. Stat.*, art. 636, making a conveyance of a homestead by a married man void, when made without the signature and separate acknowledgment of the wife. *Southern Oil Co. v. Colquitt*, 28 Tex. Civ. App. 292 (69 S. W. Rep. 169). The court say: "Such a lease and contract, in our opinion, would substantially interfere with the enjoyment by the wife of the homestead. It, in fact, would destroy the homestead use of the property, or to at least a portion of the same. The contract does not limit the amount of land the company may take for the above purpose. If the contract be considered a lease, we are of the opinion that it is void. *Dykes v. O'Connor*, 83 Tex. 160 (18 S. W. Rep. 490); *Hennessey v. Loan Co.*, 22 Tex. Civ. App. 591 (55 S. W. Rep. 125); *Williams v. City of Galveston*, (Tex. Civ. App.) 58 S. W. Rep. 551; *Franklin Land Co. v. Wea Gas, Coal & Oil Co.*, 43 Kan. 518 (23 Pac. Rep. 630). We are, however, of the opinion that the contract, although denominated an 'oil lease,' is in fact a conveyance of a portion of the homestead. It is held that oil in place under the soil is a mineral, and that minerals in

place are land. *Caldwell v. Fulton*, 31 Pa. 475 (72 Am. Dec. 760); *Wilson v. Hughes*, 43 W. Va. 826 (28 S. E. Rep. 781; 39 L. R. A. 292). An oil lease investing the lessee with the right to remove all the oil in place, in consideration of his giving the lessor a certain per cent. thereof, is, in legal effect, a sale of a portion of the land. *Wilson v. Hughes*, 43 W. Va. 826 (28 S. E. Rep. 781; 39 L. R. A. 292). The contract conveys all the oil under the homestead produced and saved, except one-tenth of the amount so produced and saved, reserved to the grantor, Towns. Such a contract, as above stated, is a conveyance of land. *Caldwell v. Fulton*, 31 Pa. 475 (72 Am. Dec. 760); *Wilson v. Hughes*, 43 W. Va. 826 (28 S. E. Rep. 781; 39 L. R. A. 292); *Franklin Land Co. v. Wea Gas, Coal & Oil Co.*, 43 Kan. 518 (23 Pac. Rep. 630); *Bryan, Pet. & Nat. Gas*, § 18; *Barring & A. Mines, & M.* 51."

Sec. 323. Conveyance by husband who has deserted his wife—Effect of presumption of his return to her. There is a presumption that a husband who has wrongfully and without cause deserted his wife will return to her again, and this presumption may be asserted by the wife to defeat the effectiveness of a conveyance of the homestead executed by him alone after such desertion, and on which his grantee seeks to sustain ejectment against the wife remaining in possession of the homestead. *Hall v. Raulston*, 70 Ark. 343 (68 S. W. Rep. 24). The court say: "Where a husband wrongfully and without cause deserts his wife, it is a reasonable presumption that he will return to her again, and that the abandonment is not permanent, but temporary. It would in such a case certainly be right that he should do so, and that he should not persist in a wrong; and the law will not presume a man guilty of a wrong, but, rather, presumes that he will do right, because it is his duty to do right. But it has been frequently decided that what amounts to an act of desertion by the husband can not have the effect of changing the home of either the husband or his deserted family. The grounds upon which this question was so decided in *Moore v. Dunning*, 29 Ill. 135 (81 Am. Dec. 301), are that 'this place still continued the home and residence of the husband, as well as his family, at least until it was proved that he had acquired a home and a settlement elsewhere; and this the law can never assume he has done.' The presumption is that he continues a wanderer, without a home, until he re-

turns to his duty and his family. Section 277, Thomp. Homest. & Exemp."

Sec. 324. Executory contract for sale of homestead by husband alone—Right of vendee to specific performance or to recover damages. Construing and applying Ia. Code 1897, §§ 2974, 2979, it is held that a contract signed by the husband alone to convey lands embracing an unplatted homestead, is invalid as to the homestead, but the vendee may have specific performance as to the remainder of the land after the selection of the homestead, which may be made by the court upon the owner's failure to do so, the value of the homestead being deducted from the contract price, and also the wife's contingent dower right, should she refuse to convey the same. *Townsend v. Blanchard*, 117 Ia. 36 (90 N. W. Rep. 519). Under Neb. Comp. Stat., ch. 36, § 4, the invalidity of an executory contract for the sale of the family homestead, to which the wife is not a party, is such that its nonperformance does not furnish a basis for a recovery of damages for the loss of the bargain. *Meek v. Lange*, Neb. (91 N. W. Rep. 695). The court says: "The plaintiff in error (defendant below) contends, in the first place, that a contract by the husband for an alienation of the homestead was not only unenforcible by way of specific performance, as was held in *Violet v. Rose*, 39 Neb. 660 (58 N. W. Rep. 216); *Larson v. Butts*, 22 Neb. 370 (35 N. W. Rep. 190); and *Clarke v. Koenig*, 36 Neb. 572 (54 N. W. Rep. 842), but that it was also unenforcible in an action for damages for nonperformance. It is admitted that there is no Nebraska case so holding in exact terms, but it is claimed that the totally void character of such contracts is sufficiently established by the above cases, with *Prout v. Burke*, 51 Neb. 24 (70 N. W. Rep. 512), and *Horbach v. Tyrrell*, 48 Neb. 514 (67 N. W. Rep. 485, 489; 37 L. R. A. 434). The doctrine that the contract was totally void, and would support no action for damages, is certainly supported by text-writers and many decisions. Wap. Homest. pp. 384, 394, and note 6; 15 Am. & Eng. Enc. Law (2d Ed.) p. 670; *Weitzner v. Thingstad*, 55 Minn. 244 (56 N. W. Rep. 817); *Cowgell v. Warrington*, 66 Ia. 666 (24 N. W. Rep. 266); *Barnett v. Mendenhall*, 24 Ia. 296; *Hodges v. Farnham*, 49 Kan. 777 (31 Pac. Rep. 606); *Thimes v. Stumpff*, 33 Kan. 53 (5 Pac. Rep. 431). In the case last cited it is held that the contract for the sale of a homestead, made by the husband alone, is so entirely void that a payment

made on it by the vendee can not be recovered back. We are cited to the Texas cases of *Wright v. Hays*, 34 Tex. 253; *Allison v. Shilling*, 27 Tex. 450 (86 Am. Dec. 622); *Brewer v. Wall*, 23 Tex. 585 (76 Am. Dec. 76); and *Groff v. Jones*, 70 Tex. 576 (8 S. W. Rep. 525; 8 Am. St. Rep. 619); and to *Henderson v. Kirkland*, 127 Ala. 185 (28 So. Rep. 674),—as establishing a different rule. These Texas cases are examined elaborately by the supreme court of Iowa in *Barnett v. Mendenhall*, 42 Ia. 296, and are found by that court to contain dicta to the effect that damages in such cases may be recovered; and are found to hold that a husband's sole agreement to convey a homestead is not void in Texas, and that it is enforceable after the death of his wife. The Alabama case holds that the provisions of the Alabama constitution that no mortgage or alienation of the homestead shall be valid without the wife's assent has the effect to render executory contracts, even when signed by her, unenforceable. The holding is that such constitutional provision has reference only to actual conveyances, and not to executory contracts; and when she has signed such a contract there is still left to her a locus poenitentiae until she actually signs the conveyance. The Iowa, Kansas, and Minnesota statutes are all substantially like ours in providing that no conveyance or incumbrance of the homestead shall be valid unless signed and acknowledged by both husband and wife. The Texas and Alabama constitutions provide as above stated against any mortgage or other alienation without the assent of the wife. This leaves room for a possible holding that merely executory contracts are valid, at least, for the purpose of collecting damages against the husband for nonperformance. It is to be noted, however, that no case of such recovery is cited from those states or any other. On the other hand, in *Berlin v. Burns*, 17 Tex. 532, a note given in settlement for damages on a contract by the husband alone to sell a homestead, which the wife refused to convey, was held to be without consideration. The court says that to allow such damages would be against the policy of the homestead law."

Sec. 325. Contract or conveyance by husband alone—Effect as a conveyance of equitable right to legal title upon extinguishment of homestead. Wis. Rev. Stat. 1898, § 2203, providing that no mortgage or other alienation by a married man of his homestead, exempt by law from execution, shall be valid or of any effect as to such homestead without the signa-

ture of the wife, does not preclude a married man, by deed or contract executed by him alone, from conveying an equitable right to the legal title to the lands used as the homestead for himself and wife at the time of such conveyance, upon the extinguishment of the homestead right by the death of the wife or otherwise. *Jerde v. Furbush*, 115 Wis. 277 (91 N. W. Rep. 661; 95 Am. St. Rep. 904; see pp. 909-944 for exhaustive collation of authorities on "The effect of a conveyance or incumbrance of the homestead by one only of the spouses.") The court say: "In *Conrad v. Schwamb*, 53 Wis. 372 (10 N. W. Rep. 395), it was in effect held that the statutory disability of the husband goes only to such dealings with the land used as a homestead as interferes with such use, and that a deed executed by him alone, construed as a contract to convey after the extinguishment of the homestead right, does not so interfere. In *Ferguson v. Mason*, 60 Wis. 377 (19 N. W. Rep. 420), the court attempted to carefully consider section 2203, Rev. Stat. 1898, and all arguments that could reasonably be advanced, based upon other statutes relating to the subject of homestead, in support of the theory that the disability of the husband under such section goes to the entire property in the land, legal and equitable, resulting in a decision in favor of the affirmative of the question we have stated, that is, that such section uses the term 'homestead' as descriptive of a right in land, a privilege to use it as a home, and that an equitable interest therein may be conveyed by the sole act of the husband, an interest entitling the grantee to the legal title to the land upon the termination of the homestead privilege. It was said that the statute must be construed as preventing him from conveying the legal title in praesenti, or conveying a future estate in fee simple, because such an interest would enable the owner thereof to seriously prejudice the enjoyment of the homestead right; but that the mere conveyance of an equitable interest, enabling the vendee to call for the legal title upon the termination of the homestead right, does not have that effect. In that the court followed judicial decisions made under statutes more or less similar to ours—*Jewett v. Brock*, 32 Vt. 65; *Whiteman v. Field*, 53 Vt. 554; *Gee v. Moore*, 14 Cal. 476; *McQuade v. Whaley*, 31 Cal. 533; *Smith v. Provin*, 4 Allen, 516; *Doyle v. Coburn*, 6 Allen, 71; *Stewart v. Mackay*, 16 Tex. 56 (67 Am. Dec. 609)—in preference to decisions to the contrary under like statutes. *Phillips v. Staunch*, 20 Mich. 369; *Hall v. Loomis*, 63 Mich. 709 (30 N. W. Rep. 374); *Barton*

v. Drake, 21 Minn. 299; Weitzner v. Thingstad, 55 Minn. 244 (56 N. W. Rep. 817); Clarke v. Koenig, 36 Neb. 572 (54 N. W. Rep. 842); Alford v. Lehmann, Durr & Co., 76 Ala. 526; Pitkin v. Williams, 57 Ark. 242 (21 S. W. Rep. 433; 38 Am. St. Rep. 241). The former authorities are to the effect that a married man may make a good conveyance of the legal title to land affected by the homestead right, subject to the enjoyment of such right. This court did not go quite that far, as we have seen, holding that the furthest that the husband can go, acting alone, is to make an executory contract binding the legal title in equity upon the satisfaction of the homestead privilege, and that a conveyance in form conveying the legal title should be given effect only as a conveyance of such equitable interest."

Sec. 326. Rights of surviving husband, wife, or children. An antenuptial contract entered into between a woman and her affianced husband in which, in consideration of the payment of a certain sum, she agrees to release and waive any widow's right of homestead, can not be enforced, after her repudiation of it, against her as his widow and an infant child afterward born to him. Zachmann v. Zachmann, 201 Ill. 380 (66 N. E. Rep. 256; 94 Am. St. Rep. 180). Ala. Code, § 2097; Laws 1887, p. 112, construed and applied—petition to set apart homestead to widow and minor children—sufficiency of allegations to confer jurisdiction. Chamblee v. Cole, 128 Ala. 649 (30 So. Rep. 630). Ark. Const. 1874, § 6, giving the widow and children the "rents and profits" of the homestead, includes not only the rents and profits of the surface, but of all the minerals beneath. Russell v. Berry, 70 Ark. 317 (67 S. W. Rep. 864). In Illinois a surviving widow takes a life estate in her deceased husband's homestead, for herself and children until the youngest child becomes 21 years of age. An attempt by her to convey to another to whom she surrenders possession, after the youngest child is of age, operates as an abandonment of the homestead, and the reversion in fee in her husband's heirs becomes absolute. Dinsmoor v. Rowse, 200 Ill. 555 (65 N. E. Rep. 1079). The widow and children of a decedent holding lands as a homestead hold as joint tenants and not as tenants in common, and the land can not be sold for the purposes of partition subject to the homestead right. Walker v. Walker, 195 Ill. 409 (63 N. E. Rep. 271). Ia Code 1873, §§ 2007, 2008 construed and applied—widow's rights as to occupancy of homestead—setting off distributive share—election.

Robson v. Lambertson, 115 Ia. 366 (88 N. W. Rep. 943); *Percifield v. Aumick*, 116 Ia. 383 (89 N. W. Rep. 1101). Under Ky. Stat., § 1707, the widow is entitled to a homestead in land of the husband occupied by him as such, subject to the right of his unmarried infant children to joint occupancy. *Atkins v. Baker*, 112 Ky. 877 (66 S. W. Rep. 1023; 23 Ky. Law Rep. 2224). The homestead rights of infant children in lands of their deceased father are not affected by his widow's election to take under a will charging the lands with the payment of his debts. *Kiesewetter v. Kress*, (Ky.) 70 S. W. Rep. 1065 (24 Ky. Law Rep. 1239). A widow's homestead rights in lands of her husband in Kentucky are not barred by her having joined with him in a mortgage thereof in which she relinquished "all right of dower" in the premises. *Kiesewetter v. Kress*, (Ky.) 68 S. W. Rep. 633 (24 Ky. Law Rep. 405). Minn. Gen. Stat. 1894, §§ 4470, 4472 construed and applied—devise of homestead to widow—renunciation—descent. *Schacht v. Schacht*, 86 Minn. 91 (90 N. W. Rep. 127). The homestead rights given to minor children of a decedent, by Mo. Rev. Stat. 1899, § 3620, can not be defeated by his widow's alienation of her quarantine, dower and homestead rights. *Phillips v. Presson*, 172 Mo. 24 (72 S. W. Rep. 501). A widow does not lose her homestead rights by her remarriage where her husband continues to live with her on the homestead, *Spratt v. Early*, 169 Mo. 357 (69 S. W. Rep. 13); nor is her homestead terminated by the loss of the members of her family by death or otherwise, *Holmes v. Nichols*, 93 Mo. App. 513 (67 S. W. Rep. 722). Under Neb. Comp. Stat., ch. 36, § 17, a homestead may be selected from the property of either the husband or the wife, and in the case of the death of either, the survivor takes the homestead free from any liability for debts contracted or existing against both or either previous to or at the time of the death of the other, though the survivor may no longer be the head of a family. *First Nat. Bank v. Reece*, 64 Neb. 292 (89 N. W. Rep. 804). For further construction of this statute, see *Fort v. Cook*, (Neb.) 90 N. W. Rep. 634. Bal. Ann. Wash. Codes & Stat., §§ 5264, 6219, 6222 construed and applied—rights of surviving widow and children. *Stewin v. Thrift*, 30 Wash. 36 (70 Pac. Rep. 116).

Sec. 327. Homestead rights of surviving widow—Effect of nonresidence. In Tennessee it is held that a homestead assigned by metes and bounds to a widow from her

husband's estate is forfeited by her removing from the state and acquiring a domicile in another state. *Coile v. Hudgins*, 109 Tenn. 217 (70 S. W. Rep. 56). To entitle a surviving wife to a widow's homestead rights in her husband's homestead, under Wyo. Rev. Stat. 1899, §§ 4736, 4737, she must at the time of his death have been a member of his family, and a resident of that state. *Ullman v. Abbott*, 10 Wyo. 97 (67 Pac. Rep. 467). The court say: "The petitioner was married to the testator in 1854 in Pennsylvania. From 1859 or 1860 to 1867 or 1868 they lived together in Denver, when the testator removed to Cheyenne, where he acquired considerable property, and where he resided, with the exception of one or two years spent in Texas, up to the time of his death, in 1896. The evidence tends to show that up to 1871 he repeatedly urged the petitioner to come to Cheyenne and live with him, but that she at all times refused, and never at any time resided with him in this state, but that up to the time of his death she generally resided in Denver, as the keeper of a disreputable house in property owned by herself. Under these circumstances, the court below held that she was not entitled to the homestead, and dismissed her petition. The correctness of this decision is the principal question in this case. The authorities are not entirely harmonious. In Missouri and Arkansas it is held that though the wife has voluntarily abandoned her husband, and is living apart from him at the time of his death, yet she is his widow, within the meaning of the law, and entitled to the homestead. *Brown v. Brown's Adm'r*, 68 Mo. 388; *Duffy v. Harris*, 65 Ark. 253 (45 S. W. Rep. 545; 40 L. R. A. 750; 67 Am. St. Rep. 925). The New Hampshire decisions are cited as sustaining the same view, but it seems to be doubtful whether that court has passed upon the precise question. In Michigan, upon the other hand, it is held that, when a wife abandons her husband and her home without legal cause (that is, not under circumstances that would entitle her to a divorce), she does not carry with her her marital rights in the homestead. *Shingle Co. v. McKenna*, 86 Mich. 283 (48 N. W. Rep. 959). And so in Texas, Tennessee and Nebraska. *Newland v. Holland*, 45 Tex. 588; *Sears v. Sears*, Id. 557; *Trawick v. Harris*, 8 Tex. 312; *Dickman v. Birkhauser*, 16 Neb. 686 (21 N. W. Rep. 396); *Prater v. Prater*, 87 Tenn. 78 (9 S. W. Rep. 361; 10 Am. St. Rep. 623)."

HUSBAND AND WIFE.

EPITOME OF CASES.

Sec. 328. Contracts and conveyances between husband and wife—Contracts encouraging separation. In Mississippi a contract by a wife with her husband, based on a sufficient consideration to release all claims on his estate, is valid. *Wyatt v. Wyatt*, 81 Miss. 219 (32 So. Rep. 317). Construing and applying Me. Laws 1886, ch. 55, and Rev. Stat., ch. 61, it is held that a husband and wife may make a valid contract that a building erected by him on her land shall remain his personal property. *Peaks v. Hutchinson*, 96 Me. 530 (53 Atl. Rep. 38; 59 L. R. A. 279). A deed of land executed by a husband to his wife in settlement of divorce proceedings brought against him, in which the wife is given the option of receiving the husband into the home as such, or excluding him upon the payment of \$200 annuity, is invalid as against public policy. *Brun v. Brun*, 64 Neb. 782 (90 N. W. Rep. 860). The court say: "The contract was calculated to bring about a separation. It is therefore distinguished from those cases where a separation has already taken place, or where one takes place immediately in pursuance of the agreement, and the situation already developed is such that future cohabitation would likely be inconsistent with the health and happiness of the parties. In the case of *Randall v. Randall*, 37 Mich. 563, it is held that 'a contract between husband and wife will not be sustained when likely to favor a separation that has not yet taken place.' In the opinion in that case Chief Justice Cooley says: 'It is not the policy of the law to encourage such separations, or to favor them by supporting such arrangements as are calculated to bring them about. It has accordingly been decided that articles calculated to favor a separation which has not yet taken place will not be supported. Citing *Durant v. Titley*, 7 Price, 577; *St. John v. St. John*, 11 Ves. 526; *Westmeath v. Westmeath*, Jac. 126. But when the separation has actually taken place, or when it has been fully decided upon, and the

articles contemplate a suitable provision for the wife and children, or an equitable and suitable division of the property, the benefits of which both have enjoyed during coverture, no principle of public policy is disturbed by them. On the contrary, if they are fair and equal, and not the result of fraud and coercion, reasons abundant may be found for supporting them.' In the case of *Boland v. O'Niel*, 72 Conn. 217 (44 Atl. Rep. 15), it is said: 'No agreement looking to a future separation of a husband and wife, nor for her maintenance after such separation, will be upheld by a court of equity.' In the case of *Hutton v. Hutton's Adm'r*, 3 Pa. 100, the supreme court of Pennsylvania says: 'Deeds for the separation of husband and wife are valid and effectual, both in law and equity, provided their object be actual and immediate, and not a contingent or future separation.' At page 104, the court says: 'It is conceded that the policy of the law does not sanction contracts by which husband and wife may be induced to separate.' In the case of *Jenne v. Marble*, 37 Mich. 320, it is said: 'The law does not intend any rule that will tend to destroy the value and confidence of the marital relations.' In *Wilde v. Wilde*, 37 Neb. 891 (56 N. W. Rep. 724), this court has said that a contract between husband and wife, manifestly against public policy or sound morals, will not be enforced."

Sec. 329. Conveyances to husband and wife—Estates by entireties. The common law rule of estates by entireties prevails in North Carolina. *Spruill v. Branning Mfg. Co.*, 130 N. C. 42 (40 S. E. Rep. 824). Estates by entireties were abolished in Kansas by Laws 1891, ch. 203 (Gen. Stat. 1901, § 2534). *Stewart v. Thomas*, 64 Kan. 511 (68 Pac. Rep. 70). Prior to Mass. Stat. 1885, ch. 237, declaring that conveyances to husband and wife should create estates in common, the common law prevailed in Massachusetts; and this statute does not affect conveyances executed to husband and wife before its passage. *Pease v. Inhabitants of Whitman*, 182 Mass. 363 (65 N. E. Rep. 795). The common-law fiction of the unity of husband and wife being inconsistent with the laws of Oklahoma, it is held that the common-law rule of estate by entirety does not obtain there, and a conveyance of land to husband and wife by ordinary warranty deed gives each an undivided one-half interest in the fee simple. *Helvie v. Hoover*, 11 Okla. 687 (69 Pac. Rep. 958). For a discussion of the creation of an estate by entirety in personal property, see *Johnston v. Johnston*, 173

Mo. 91 (73 S. W. Rep. 202; 61 L. R. A. 166; 96 Am. St. Rep. 486).

The wife alone can not maintain trespass affecting lands held by entireties which are in the possession of both herself and husband. *Fowles v. Hayden*, 130 Mich. 47 (89 N. W. Rep. 571). Where husband and wife owning land by entireties convey it to another who reconveys to the husband, in order to enable him to mortgage the same for his own benefit which he does, and there is a secret agreement between them that the land is to be reconveyed to them, the mortgagee who has no notice of such agreement or that the change in title was made to avoid the statutory inhibition (*Burns' Ind. Rev. Stat.*, § 6964) against the wife mortgaging her land for the husband's debt, is not charged with notice of these things. *Webb v. John Hancock Mut. Life Ins. Co.*, Ind. App. (66 N. E. Rep. 470). Under the common law and the statutes of Vermont a husband's estate in lands held by entireties being subject to conveyance or mortgage by him and to execution for his debts, subject to the wife's contingent right of survivorship, it is held that, subject to this limitation, land held by entireties passes by an assignment of the husband's estate by a court of insolvency; *Vt. Rev. Stat.*, § 2647, providing that neither the separate property nor its rents and profits shall be subject to the disposal of her husband, or liable for his debts, having no application. *Laird v. Perry*, 74 Vt. 454 (52 Atl. Rep. 1040; 59 L. R. A. 340). For a consideration of the effect of the married women statutes of Wisconsin on estates by entireties, see *Citizen's Loan & Trust Co. v. Witte*, 116 Wis. 60 (92 N. W. Rep. 443). *Wis. Laws 1903*, ch. 362, provide for a judicial determination and record of the termination of life estates, and of the survivorship of tenants by the entirety.

Sec. 330. Conveyances to husband and wife—Estates by entireties—Partition deeds do not create. A conveyance made for the purpose of partitioning land in which a wife has an undivided interest which purports to convey such interest to her and her husband, does not create an estate by entireties in them, or vest in him any title to the land. *Sharitz v. Moyers*, 99 Va. 519 (39 S. E. Rep. 166); *Harrington v. Rawls*, 131 N. C. 39 (42 S. E. Rep. 461); *Snyder v. Elliott*, 171 Mo. 362 (71 S. W. Rep. 826). The same rule applies where the deed embraces more land than the wife's undivided interest, for which surplus she and her husband executed a note to one

of the coparceners; the husband being treated merely as her surety. *Propes v. Propes*, 171 Mo. 407 (71 S. W. Rep. 685). The court say: "A similar question was before this court in the case of *Whitsett v. Wamack*, 159 Mo. 14 (59 S. W. Rep. 961; 81 Am. St. Rep. 339), in which it was held that a deed of release or quitclaim made by two coparceners to a third and her husband in an effort at voluntary partition of their jointly inherited estate conveys no title to the husband. In *Palmer v. Alexander*, 162 Mo. 127 (62 S. W. Rep. 691), the plaintiff and his sister made parol partition between themselves of the lands inherited from their father, but by mistake the deeds incorrectly described the lands. Thereafter she married, and, to correct the mistake, new deeds were made, but in the deed to her she and her husband were named as grantees, and, on the theory that this deed created as estate by the entirety in them, after her death plaintiff bought the land from the surviving husband, and it was held that the husband acquired no title to the land by the deed in partition, and therefore his deed to plaintiff conveyed none. The lands were rightly the wife's by descent, having descended to her by operation of the statute, and the deed conveyed no title to her, but simply adjusted among the coparceners the right to several possession by metes and bounds. So, in the recent case of *Cottrell v. Griffiths*, 108 Tenn. 191 (65 S. W. Rep. 397; 57 L. R. A. 332; 91 Am. St. Rep. 748), the Tennessee supreme court held: Including the husband as grantee in a deed to partition to the wife her share of property in which she has an undivided interest will vest in him no greater interest than if the deed were made to the wife alone. The same rule is announced in *Davis v. Davis*, 46 Pa. 342; *Stehman v. Huber*, 21 Pa. 260; *Carson v. Carson*, 122 N. C. 645 (30 S. E. Rep. 4). And this is so even if the deed in the case at bar was made to the plaintiff and her husband by her direction, as the grantors conveyed no part of their shares, and had no interest in the share embraced in the deed to the grantees. It belonged to the wife by inheritance, and, the title being already in her, the deed merely designated her share by metes and bounds, in order that it might be held in severalty. *Harrison v. Ray*, 108 N. C. 215 (12 S. E. Rep. 993; 11 L. R. A. 722; 23 Am. St. Rep. 57); *Yancey v. Radford*, 86 Va. 638 (10 S. E. Rep. 972). But it is said that, where more lands are conveyed than the wife's share, as in this case, and a consideration passes between the husband and the grantors of the additional land, an entirely different condition

arises, and the consideration in this case supports the case, and whether much or little can not be disputed, for the purpose of destroying the effect of the conveyance. This precise question was before the supreme court of Pennsylvania in the case of *Moderwell v. Mullison*, 21 Pa. 260, and it was said that: 'When land is held in common by a married woman and others, and they all join in a partition, and her share is conveyed to her and her husband, the law looks at the character of the transaction, rather than at the form of the conveyance, in order to define her interest, and considers the share as still hers, a divided share being substituted for an undivided one. If the husband has paid money for equality of partition; and the conveyance be to the husband and wife, he acquires an interest in common with her in proportion to the amount.' That case is bottomed upon the soundest principles of equity, and, as defendant in the case at bar paid towards the purchase money of the additional land allotted to plaintiff the sum of \$240, he should be considered as having done so as the surety of his wife, and should, upon an adjustment of their money transactions, be allowed credit, with interest at 6 per cent. per annum from the time of its payment. The payment of the balance of the purchase money, could, of course, be enforced against the land."

Sec. 331. Effect of divorce on real property rights—Judgment for alimony or support—Lien on homestead. Title to real estate can not be litigated in divorce proceedings except as incident to a decree of divorce. *Wetmore v. Wetmore*, 40 Or. 332 (67 Pac. Rep. 98). Citing, *Houston v. Timmerman*, 17 Or. 499 (21 Pac. Rep. 1037; 4 L. R. A. 716; 11 Am. St. Rep. 848); *Uhl v. Uhl*, 52 Cal. 250; *Peck v. Peck*, 66 Mich. 586 (33 N. W. Rep. 893). The parties to a proceeding for divorce may by contract fix their property rights and such contract, when approved by the court, may be carried into its decree and thus become a binding obligation. *Hassaurek v. Hassaurek's Admr.*, 68 O. St. 554 (67 N. E. Rep. 1066). A court, in proceedings brought by a wife for a divorce, may decide that lands, the title to which is held by a third person who is made a party, belong to the husband and award the same to the wife as alimony. *Van Vleet v. DeWitt*, 200 Ill. 153 (65 N. E. Rep. 677). Applying S. Dak. Comp. Laws, § 2585, providing that "the court, in rendering a decree of divorce, may assign the homestead to the innocent party, either

absolutely or for a limited period, according to the facts in the case, and in consonance with the law relating to homesteads," it is held that the court may make a judgment against the husband for the support of the wife, provided for by § 2584, a lien on lands held by him as a homestead and direct a sale thereof. *Harding v. Harding*, S. Dak. (92 N. W. Rep. 1080). The court say: "In *Blankenship v. Blankenship*, 19 Kan. 159, the supreme court of Kansas says: 'The power to take the homestead from the husband, and assign the same to the wife, is the exercise of greater power than making a sum allowed as alimony a lien upon all the property of the husband, and ordering the same sold to discharge the lien. The greater power includes the less; and we find no error as to the sale of the homestead, it appearing from the record that the plaintiff in error was possessed of this identical property at the rendition of the judgment.' *Southworth v. Southworth*, 168 Mass. 511 (47 N. E. Rep. 93); *Graves v. Graves*, 108 Mass. 314; *Craig v. Craig*, 163 Ill. 176 (45 N. E. Rep. 153); *Gaston v. Gaston*, 114 Cal. 542 (46 Pac. Rep. 609; 55 Am. St. Rep. 86); *Foster v. Foster*, 56 Vt. 540. Again, in *Gaston v. Gaston*, supra, the supreme court of California held that, independently of the statute, a court of equity possessed the power to decree that the alimony awarded shall be a lien upon the defendant's real estate, including his homestead. That court, after quoting the provisions of the statute, which seems to be practically the same as ours, use the following language: 'Appellant claims that the effect of this section is to render void the portion of the judgment imposing a lien on his land; that the power of the court was limited to exacting security from him. We think the law is otherwise. With us, an action for divorce is treated as a case in equity—*Wadsworth v. Wadsworth*, 81 Cal. 187 (22 Pac. Rep. 648; 15 Am. St. Rep. 38),—and the statute ought not to be construed as abridging the power exercised by courts having cognizance of matrimonial causes—commonly, though not always, as a branch of their chancery jurisdiction—to declare a lien for securing the award of support to the wife in such cases. Said the supreme court of Ohio, of a judgment like the present, except that it omitted the provisions for a lien: "That it is within the legitimate power of the court to make such decree a charge upon real estate we have no doubt, and it has been the practice so to do in cases where it is deemed proper." *Olin v. Hungerford*, 10 Ohio, 268. And such is the current authority, with but little dissent. Wight-

man v. Wightman, 45 Ill. 167; O'Callaghan v. O'Callaghan, 69 Ill. 552; Holmes v. Holmes 29 N. J. Eq. 9, 12. Many other cases are collected in the reporter's note to Stoy v. Stoy, 41 N. J. Eq. 370 (2 Atl. Rep. 638; 7 Atl. Rep. 625). The appellant relies upon the case of Brady v. Krueger, 8 S. Dak. 464 (66 N. W. Rep. 1083; 59 Am. St. Rep. 771), decided by this court, but the law as laid down in that case does not in any manner control the case at bar. In the decree of divorce in that case no mention was made of the homestead, and there was no amended decree. Clearly, in such a case, the divorced wife would have no interest in the homestead after the decree of divorce. We are clearly of the opinion that, both under the liberal provisions of our statute and the general powers invested in courts of equity, it was perfectly competent for the circuit court to so far modify the original judgment as to make the alimony a lien upon the homestead in the possession of the defendant."

IMPROVEMENTS.

EPITOME OF CASES.

Sec. 332. Occupying claimants. Statutes giving unsuccessful defendants in ejectment the right to recover for improvements made in good faith are constitutional. Tice v. Fleming, 173 Mo. 49 (72 S. W. Rep. 689; 96 Am. St. Rep. 479); Dorer v. Hood, 113 Wis. 607 (88 N. W. Rep. 1009). To constitute structures upon land permanent improvements, so as to entitle a defendant in ejectment to an assessment and allowance of their value, under Ala. Code, §§ 1536, 1537, they must be so attached to the land as to become a part of it, and it must be shown that they enhanced the value of the land. Barrett v. Kelly, 131 Ala. 378 (30 So. Rep. 824). The right of one who has been ousted from possession by an adverse title to petition for allowance for improvements, under Ia. Code, tit. 14, ch. 7, is lost by his failure to file the required petition before surrendering possession. Lindt v. Uihlein, 116 Ia. 48 (89 N. W. Rep. 214). Ky. Stat., § 3728, giving an occupying claimant whose claim of title is founded on "a public record"

a lien for improvements, applies only to one who claims to derive title from the commonweath. *Wintersmith v. Price*, (Ky.) 66 S. W. Rep. 2 (23 Ky. Law Rep. 2005). But one who makes improvements on the land of another, in good faith and under the belief that he has title, is entitled to equitable relief upon recovery of the land, where, on account of his inability to trace title to the commonweath, he is unable to recover under the occupying claimant's law. *Darnall v. Jones' Ex'rs*, (Ky.) 72 S. W. Rep. 1108 (24 Ky. Law Rep. 2090). The fact that an unsuccessful defendant in ejectment, who seeks to recover for improvements under Wis. Rev. Stat., § 3096, made improvements after the commencement of the action against him, is not such evidence of bad faith as deprives him of the right to recover. *Dorer v. Hood*, 113 Wis. 607 (88 N. W. Rep. 1009). The court say: "Mere notice of an adverse claim is not considered, in other states which have statutes of similar general character, to forbid the conclusion that subsequent improvements were made in good faith. *Griswold v. Bragg*, 19 Blatchf. 94 (6 Fed. Rep. 342); *Harrison v. Castner*, 11 O. St. 339; *Whitney v. Richardson*, 31 Vt. 300; *Wells v. Riley*, 2 Dill. 566 (Fed. Cas. No. 17,404)."

Sec. 333. Occupying claimants—Color of title necessary—Grantee in void deed. A will, void under Sand & H. Ark. Dig., § 7400, because of testatrix's failure to mention her living children, is sufficient to constitute color of title for one holding land thereunder as devisee, within the occupying claimant's law of Arkansas. *Bloom v. Strauss*, 70 Ark. 483 (69 S. W. Rep. 548). One occupying under a void tax title has such color of title as entitles him to recover for improvements, under Mich. Comp. Laws, 1897, § 10995, where he occupied in good faith under the belief that he had a valid title. *Thomas v. Wagner*, 131 Mich. 601 (92 N. W. Rep. 106). Construing and applying S. Dak. Comp. Laws, § 5455, providing for the allowance to a defendant in an action for the recovery of real property, of the value of permanent improvements made by him, "or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith," it is held that where neither party to the action claims any higher or better title than actual possession, a defendant in such actual possession under a bona fide claim of title holds under color of title, within the meaning of the statute, to the extent of his actual occupancy or actual possession. *Pendo v. Beakley*, 15

S. Dak. 344 (89 N. W. Rep. 655). See opinion for discussion of when color of title may exist without paper title. Where one who makes improvements on land occupied under a contract of purchase afterward receives a deed it will relate back to his occupancy under the contract, rendering that under color of title. Wis. Rev. Stat., § 3096 construed and applied. *Dorer v. Hood*, 113 Wis. 607 (88 N. W. Rep. 1009). See opinion for discussion of what constitutes "color of title."

A grantee in a deed void under a statute (Ia. Code, 1873, § 1550), because executed in payment for liquors intended to be sold in violation of law, does not thereby acquire such color of title as will entitle him to recover under the occupying claimant's law (Ia. Code, tit. 14, ch. 7) the value of improvements placed on the property by him while in possession under such deed; nor will his acts of ownership in pursuance of possession taken under such a deed, such as payment of taxes and making improvements give him the necessary color of title, they lacking the essential element of good faith. *Lindt v. Uihlein*, 116 Ia. 48 (89 N. W. Rep. 214). The court say: "We first inquire whether defendants were in possession of the property under color of title. By the term 'color of title' is meant that which appears to be title, but which in reality is no title. *Wright v. Mattison*, 18 How. 56 (15 L. Ed. 280). It involves, also, the idea of some deed of conveyance or some paper or document upon which the holder may reasonably rely as vesting in him the real ownership of the property. *Hamilton v. Wright*, 30 Ia. 486; *Herbert v. Hanrick*, 16 Ala. 595; *Brooks v. Bruyn*, 35 Ill. 394. The legislature has extended the scope of the term, under certain restrictions, for the benefit of mere occupants of land who are in possession under claim of title for a period of five years, or for a less period where taxes are paid and valuable improvements made by them. Code, § 2967. Bearing this definition in mind, we have next to inquire how far, if at all, the defendant's status as the alleged holder of the colorable title is affected by the decree of the court in the principal cause, and by the statute upon which such decree was rendered. That statute, as it stood at the date of the deed, reads as follows: 'All payments or compensation for intoxicating liquors sold in violation of this chapter, whether such payments or compensation be in money, goods, land, labor, or anything else whatsoever, shall be held to have been received in violation of law and against equity and good conscience. * * * All sales, transfers, convey-

ances, mortgages, liens, attachments, pledges and security of every kind, which, either in whole or in part, shall have been made for or on account of intoxicating liquors sold in violation of this chapter, shall be utterly null and void against all persons and in all cases and no rights of any kind shall be acquired thereby.' Code 1873, § 1550. Under these provisions the defendant's deed has been adjudged void. That a deed which is void for want of title in the grantor, or for any irregularity in its execution or acknowledgment, or for any other cause not chargeable to the wrong or fraud of the grantee, is sufficient to constitute color of title, though denied by many authorities, may be regarded as well settled by the more modern decisions of the courts of this country. *Railway Co. v. Allfree*, 64 Ia. 504 (20 N. W. Rep. 779). But to constitute color of title for the purposes of asserting any right thereunder against the true owner, the deed or paper upon which it is sought to be based must have been obtained in good faith. *Smith v. Young*, 89 Ia. 338 (56 N. W. Rep. 506). In the case cited, Mrs. Young claimed to have color of title by virtue of a deed which had been made to her under such circumstances that she was legally bound to know its validity, and the court says: 'Conceding that, to one not possessed of the actual facts, the conveyance would have constituted a color of title or claim of right, as a basis for the operation of the statute of limitations, so as to justify a title by adverse possession, no such rule obtains in favor of one actually knowing that he or she has no title or claim.' In Maryland it is held that 'the paper title, to give color, must be so far prima facie good in appearance as to be consistent with the idea of good faith.' *Baker v. Swan's Lessee*, 32 Md. 355. 'A deed fraudulently obtained is a nullity, and gives the fraudulent grantee not even a colorable title.' *Crary v. Goodman*, 22 N. Y. 177. 'A party can not have the advantage of an entry under color of title unless his deed which gives colorable title was obtained bona fide. If obtained by fraud, or with knowledge that the grantor had no title to convey, the deed will avail the grantee nothing.' *Foulke v. Bond*, 41 N. J. Law, 541. It is true that these cases, as well as many others which might be cited to the same point, have generally arisen where it has been sought to perfect a colorable title by adverse possession, and not in a contest over improvements, but the principle underlying the doctrine is the same in both instances. Color of title, so far, at least, as it is based upon the deed, is neither more nor less in one case than in the

other; and the defendants having taken a conveyance which they were conclusively bound to know the statute denounced as 'utterly null and void against all persons and in all cases,' and as conferring 'no rights of any kind,' they can not rely upon such instrument as giving them color of title. It may be said that this deed was not obtained by fraud, and that is true, in the sense that defendants did not, so far as the evidence shows, in any manner deceive or overreach Mrs. Pralor in the attempted purchase of the property; but the whole transaction was tainted with illegality and by the terms of the statute they are conclusively held to have received their deed 'in violation of law and against equity and good conscience.' No claim based upon such a foundation can be recognized or enforced in a court of equity.

It being determined that defendants obtained no color of title through Mrs. Pralor's deed, it remains to be ascertained whether they can base such claim upon the conceded fact that while in possession they paid taxes and made valuable improvements upon the property. That such acts of ownership would be a sufficient color of title, under the laws of this state, must be admitted, if in so doing defendants can be said to have acted in good faith. What, then is 'good faith,' as those words are here employed? Counsel for appellant insists that good faith is an honest belief in the validity of one's title, and such is substantially the definition given by many eminent authorities. Accepting that definition as correct, can a party be heard to say that by a conveyance obtained in violation of law, and in a manner which the statute says shall be treated as against equity and good conscience, he honestly believes himself invested with a good title? We think not. The doctrine of honest belief, even where the deed is tainted with no criminality in its origin, is subject to well-defined limitations. The claimant must not only entertain an honest belief in the validity of his title, but he must have some reasonable ground upon which to base such confidence. *Snell v. Mechan*, 80 Ia. 83 (45 N. W. Rep. 398); *Johnson v. Schumacher*, 72 Tex. 334 (12 S. W. Rep. 207); *Singleton v. Jackson*, 2 Litt. 208; *Stark v. Starr*, 1 Sawy. 15 (Fed. Cas. No. 13, 307); *Haymond v. Camden*, 48 W. Va. 463 (37 S. E. Rep. 642); *Williamson v. Jones*, 43 W. Va. 562 (27 S. E. Rep. 411; 38 L. R. A. 694; 64 Am. St. Rep. 891); *Wales v. Coffin*, 100 Mass. 177; *Walker v. Quigg*, 6 Watts, 87 (31 Am. Dec. 452); *Dart v. Hercules*,

57 Ill. 446; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Wood v. Wood*, 83 N. Y. 575; *Cook v. Kraft*, 3 Lans. 512; *Davidson v. Barclay*, 63 Pa. 406; *Gaines v. Kennedy*, 53 Miss. 103; *Deffenback v. Hawke*, 115 U. S. 392 (6 Sup. Ct. Rep. 95; 29 L. Ed. 423). In the last case cited, Field, J., says: 'There can be no such thing as good faith where the party knows he has no title, and that under the law, which he is presumed to know, he can acquire none by his occupation.' Possession in good faith involves not only honest belief in the possessor's title, but the absence of all knowledge on his part of any facts or circumstances which ought to put him upon inquiry, or tend to render his possession unconscientious. *Bouv. Law Dict. Black, Law Dict. Adam's Glossary* defines a 'bona fide possessor' as one 'who, being in actual possession, is excusably ignorant of the facts which show he is not entitled to possess.' This court has said that the making of improvements in good faith implies that the occupancy must also be bona fide. *Lundquest v. Ten Eyck*, 40 Ia. 216. In other words, if the occupancy is stamped with any circumstances which conclusively indicates bad faith, then no improvements placed upon the property under such occupancy can be said to have been made in good faith. This is just the position in which defendants find themselves. They must be presumed to have known the law of the state. The statute, whatever we may think of its wisdom or propriety, was plain, unambiguous, and emphatic, and commanded their obedience. They deliberately and in full view of the consequences undertook to encourage and promote a violation of the laws, and, as a means to that end, took this deed from Mrs. Pralor, and went into occupancy by her as their tenant. The character of the occupancy can not be divorced from the character of the transaction by which their possession was obtained. Both fell under the ban of the statute which declares them to be 'in violation of law and against equity and good conscience.' To hold otherwise is to say that a man may flagrantly violate the law, defy its penalties, and then come into court and have his offenses made the grounds of equitable relief. The many cases which have been or may be cited where courts have exercised great liberality, if not ingenuity, in extending the presumption of good faith for the relief of persons claiming compensation for improvements on land, will be found to have been cases of hardship, in which the misfortune of the party relieved is in no manner chargeable to his own wrong. On the other hand, the cases are

numerous holding that where the instrument constituting the color of title was obtained by fraud, or with knowledge by the holder that it conveys no title, his possession is not in good faith. *Reay v. Butler*, 95 Cal 206 (30 Pac. Rep. 208); *Crispen v. Hannavan*, 50 Mo. 536; *Saxton v. Hunt*, 20 N. J. L. 487; *Foulke v. Bond*, 41 N. J. L. 527; *Moore v. Brown*, 11 How. 414 (13 L. Ed. 751); *Eberts v. Eberts*, 55 Pa. 110; *Thompson v. Thompson*, 16 Wis. 91; *Mosely v. Miller*, 13 Bush, 408; *Linthicum v. Thomas*, 59 Md. 583. To these observations it may be added that where contracts have been made either in violation of the express letter of the law, or in contravention of its policy or spirit, no rights can be based thereon which the courts will recognize or enforce. This principle is not dependent upon any statutory enactment. *Guenther v. Dewien*, 11 Ia. 133; *Reynolds v. Nichols*, 12 Ia. 398. The contract between defendants and their grantor contemplated a violation of the law on part of both parties to the deed, and the possession of the property was obtained and utilized in furtherance of that unlawful design. The financial loss, if any, which they thus suffer, is such only as they might have foreseen, and the law affords them no remedy."

Sec. 334. Improvements by grantees and mortgagees.

A good faith purchaser making improvements is entitled to compensation therefor to the extent they have enhanced the salable value of the property. *Floyd v. Mackey*, 112 Ky. 646 (66 S. W. Rep. 518; 23 Ky. Law Rep. 2030). In South Dakota it is held that one holding property under a contract for its purchase does not hold under color of title so as to entitle him to recover the value of improvements made by him while in possession, in an action of ejectment brought by his vendor on account of forfeiture of his contract. *Coleman v. Stalnacke*, 15 S. Dak. 242 (88 N. W. Rep. 107). In Nebraska it is held that a purchaser at foreclosure with notice of the rights and claims of a junior mortgagee, whose right to redeem has not been divested by the foreclosure, can not set up a claim for compensation for improvements on redemption by the junior mortgagee. *Jones v. Dutch*, (Neb.) 92 N. W. Rep. 735. A mortgagee going into possession before foreclosure, who makes repairs on the premises which are not necessary to their preservation and are not made in good faith for the purpose of occupation, but in order that the property might bring a higher price at the sale, is not entitled to be allowed the value

of such repairs. *Fletcher v. Bass River Sav. Bank*, 182 Mass. 5 (64 N. E. Rep. 207; 94 Am. St. Rep. 632).

Sec. 335. Improvements by life tenant. A tenant for life who puts improvements on land is not entitled to compensation from the remainderman. *Trimmier v. Darden*, 61 S. C. 220 (39 S. E. Rep. 373). But in Arkansas it is held that the holder of a life estate may be entitled to compensation for betterments when he in good faith claims the entire interest under color of title thereto, and makes the improvements under the belief that he is the owner in fee. *Bloom v. Stauss*, 70 Ark. 483 (69 S. W. Rep. 548). The value of improvements made on land by one holding a determinable fee therein can not be recovered by her executor on her death prior to the death of the remainderman; *Burns' Ind. Rev. Stat.*, § 1087, entitling an occupying claimant to pay for improvements made in good faith, not applying in such a case. *Pulse v. Osborn*, 30 Ind. App. 631 (64 N. E. Rep. 59). Remaindermen who seek to quiet title against a claim of title by the life tenant based on a sale of the property for nonpayment of assessments for municipal improvements, on account of the purchase having been made by the husband of the life tenant and therefore inured to the benefit of the remaindermen, must first account to the holder of such title for the amounts paid for street improvements and other taxes, less the reasonable value of the rents and profits. *Merritt v. Ritter*, 158 Ind. 491 (63 N. E. Rep. 855). A covenant in a lease by a life tenant to purchase improvements made by the lessee, is not binding on the remainderman. *Chivers v. Race*, 196 Ill. 71 (63 N. E. Rep. 701).

Sec. 336. Improvements by tenants and cotenants. A landlord being unable to pay for buildings erected by his tenant which, by the terms of the lease, he is required to purchase at the end of the term, may assign the rents and profits of the premises to the tenant as security for such indebtedness and such an assignment gives the lessee an equitable lien on the property in his favor of which his continued possession gives notice to a subsequent mortgagee, and under such an agreement he may claim his necessary disbursements in caring for the property, with reasonable compensation for his services. *Allen v. Gates*, 73 Vt. 222 (50 Atl. Rep. 1092). For general rules governing an accounting where a lessee has a lien on the

rents and profits of the leased premises on account of improvements made by him, see *Allen v. Gates*, 74 Vt. 376 (52 Atl. Rep. 963). A conveyance from one coparcener to another coparcener of his undivided interest in the common land does not pass his pre-existing demand against his coparceners or their interests in the land for improvements put upon the land, unless such demand is expressly released or transferred in the conveyance. *Ward v. Ward's Heirs*, 50 W. Va. 517 (40 S. E. Rep. 472).

Sec. 337. Improvements placed on railroad right of way. A landowner who brings a suit to recover the value of a strip of land taken without right by a railroad corporation for a right of way for its road, against a corporation succeeding to the wrongdoer, thereby waives his right to recover for the improvements which the original corporation put thereon. *Cochran v. Missouri, K. & T. Ry. Co.*, 94 Mo. App. 469 (68 S. W. Rep. 367). Structures placed on land by a railroad company having the power of eminent domain, and in pursuance of defective condemnation proceedings, may be removed by it upon its subsequent ejectment from the land. *Illinois Cent. R. Co. v. Hoskins*, 80 Miss. 730 (32 So. Rep. 150; 92 Am. St. Rep. 612).

INFANTS AND INSANE PERSONS.

EPITOME OF CASES.

Sec. 338. Validity of contracts and conveyances. A bid at an execution sale of property is an executory contract, and, when made by one lacking the necessary mental capacity to contract, is voidable, although he had not been adjudged insane, the officer making the sale had no knowledge of his condition, and there was nothing in the appearance or conduct of the bidder to indicate his condition. *Cundell v. Haswell*, 23 R. I. 508 (51 Rep. 426). In Alabama a deed executed by a person non compos mentis is void. *Daugherty v. Powe*, 127 Ala. 577 (30 So. Rep. 524); *Wilkinson v. Wilkinson*, 129 Ala. 279 (30 So. Rep. 578); *Galloway v. McLain*, 131 Ala.

280 (31 So. Rep. 603). The deed of an insane person not under guardianship is merely voidable, and vests title until disaffirmed by the grantor on becoming sane or by his heirs. It is the act of disaffirmance which renders the voidable deed a nullity, and where the grantor continues insane until his death the right of his heirs to disaffirm the deed and recover the land is not barred by the statute of limitations. *Downham v. Holloway*, 158 Ind. 626 (64 N. E. Rep. 82; 92 Am. St. Rep. 330). The deed of an insane grantor may be set aside by one to whom he has conveyed the premises after his restoration to sanity; but a court of equity can not award the plaintiff a writ of restitution to put him in possession. *Clay v. Hammond*, 199 Ill. 370 (65 N. E. Rep. 352; 93 Am. St. Rep. 146; see pp. 154-165 for exhaustive note on "Jurisdiction of equity to put party in possession in aid of its decree").

Sec. 339. Affirmance and disaffirmance. The ratification by one after his becoming of age, of a conveyance made to him while a minor extends to a mortgage given by him on the land at the same time and forming a part of the same transaction, to one furnishing the money to pay the purchase price. *Ready v. Pinkham*, 181 Mass. 351 (63 N. E. Rep. 887). The right of a wife to disaffirm a deed to the homestead, in the execution of which she joined, on account of her infancy does not depend upon her return of the consideration, it not appearing that she received any of it. *McBroom v. Whitefield*, 108 Tenn. 422 (67 S. W. Rep. 794). An infant remainderman conveying his interest in real property is not required to disaffirm his conveyance during the continuance of the life estate, though in the meantime he has become an adult, but may disaffirm, after the expiration of such estate, at any time before the right to maintain an action to recover the property has been barred by the statute of limitations. *Shipp v. McKee*, 80 Miss. 741 (31 So. Rep. 197; 92 Am. St. Rep. 616). In an opinion in this case filed in response to suggestions of error it is held, reviewing conflicting cases, that an infant has the full time fixed by the statute of limitations after majority in which to disaffirm, and that mere silence continued for a period less than that prescribed by the statute of limitations, unless accompanied by conduct that would estop, will not bar an infant's right to avoid the deed. *Shipp v. McKee*, 80 Miss. 741 (32 So. Rep. 281; 92 Am. St. Rep. 616).

In discussing the subject of disaffirmance, the Appellate

Court of Indiana, in the case of *Shroyer v. Pittinger*, 31 Ind. App. 158 (67 N. E. Rep. 475), say: "An infant's conveyance of lands, being not void, but voidable, can not be avoided or disaffirmed because of nonage, merely, until the infant reaches majority; and no right of action because of infancy at the time of the conveyance, as to lands conveyed, exists until the conveyance has been avoided or disaffirmed. While a conveyance of the same land to some one else after majority, and in disregard of the former deed, is a disaffirmance of the deed made during infancy, yet the doctrine that the act of disaffirmance must be by instrument of equal solemnity with the instrument sought to be avoided no longer obtains. Nor do we understand it to be the rule in this state, as claimed by counsel, that the act of disaffirmance must necessarily be in writing, and served upon the grantee. Such an act would be a disaffirmance, but not exclusively so. Disaffirmance does not consist wholly of some act done, but is a matter both of act and intention, and is accomplished where the party, after full age, and intending to disaffirm, does some act of positive and distinct dissent, inconsistent with the continued validity of the contract made during infancy. The rule is thus stated in *Long v. Williams*, 74 Ind. 115: 'There are in this state several well-recognized modes of disaffirming a voidable deed. The disaffirmance may be by entry upon the land, by a written notice of disaffirmance, by a subsequent conveyance, or by any other equally emphatic act declaratory of an intention to disaffirm.' See *McCarty v. Woodstock Iron Co.*, 92 Ala. 463 (8 So. Rep. 417; 12 L. R. A. 136); *Singer, etc., Co. v. Lamb*, 81 Mo. 221; *Illinois Land Co. v. Beem*, 2 Ill. App. 390; *Allen v. Poole*, 54 Miss. 323; *Dixon v. Merritt*, 21 Minn. 196; *Cogley v. Cushman*, 16 Minn. 397 (Gil. 354); *State v. Plaisted*, 43 N. H. 413; *Bagley v. Fletcher*, 44 Ark. 153; *Drake's Lessee v. Ramsay*, 5 Ohio, 251; *Moore v. Abernathy*, 7 Blackf. 442; *Buchanan v. Hubbard*, 119 Ind. 193 (21 N. E. Rep. 538); *Craig v. Van Bebbber*, 100 Mo. 584 (13 S. W. Rep. 906; 18 Am. St. Rep. 569, note).

The time within which the deed must be disaffirmed after the infant becomes of full age depends upon the particular circumstances of each case. The object sought to be accomplished in requiring a disaffirmance is to avoid litigation, and to enable the parties to correct the evils without suit and costs. *McClanahan v. Williams*, 136 Ind. 30 (35 N. E. Rep. 897); *Lange v. Dammier*, 119 Ind. 567 (21 N. E. Rep. 749). All

the authorities seem to agree that the contract must be disaffirmed within a reasonable time. 'What constitutes a reasonable time,' said the court in *Sims v. Bardoner*, 86 Ind. 87 (44 Am. Rep. 263), 'within which a person who has executed a deed during infancy shall disaffirm it, depends upon the particular circumstances of each case. The right must be exercised before the statute of limitations has become a bar to an action to recover the land conveyed, and it may be, under the circumstances of the particular case, that it should be exercised within a shorter period. It is the disaffirmance which avoids the deed of the infant, and not the bringing of the action to recover the land conveyed.' "

Sec. 340. Judicial sale of infant's lands. An attorney employed by the next friend of several infants, who procures a sale of their land, is entitled to receive compensation for his services out of the proceeds of the sale. *Senseney v. Repp*, 94 Md. 77 (50 Atl. Rep. 416). Where a sale, made under W. Va. Code, ch. 83, of real estate devised to a testator's daughter for her natural life, remainder in fee to her heirs, is made upon the application of the guardian of her children, her children born after such sale are deemed to have been before the court by representation, and can claim no interest except in the fund arising from the sale, and in it they are entitled to share equally with the others. *Ammons v. Ammons*, 50 W. Va. 390 (40 S. E. Rep. 490). A provision in a testator's will that his estate should be kept together and the income paid to his wife and children during her life, is not such a provision, within the meaning of Shannon's Tenn. Code, § 5089, as will prevent a sale of the interests of minors under ch. 3, art. 7. *Lenlow v. Arrington*, Tenn. (69 S. W. Rep. 314). Ky. Civ. Code Prac., §§ 489-492 construed and applied—sale of infants' real estate. *Womble v. Price's Guardian*, 112 Ky. 533 (66 S. W. Rep. 370; 23 Ky. Law Rep. 1939); *Hicks v. Jackson*, (Ky.) 68 S. W. Rep. 419 (24 Ky. Law Rep. 218); *Zehnder v. Schoenbachler*, (Ky.) 70 S. W. Rep. 278 (24 Ky. Law Rep. 947).

INSURANCE.

EPITOME OF CASES.

Sec. 341. Title insurance. An action does not accrue on a policy of title insurance until there has been an eviction of the insured by the holder of the paramount title, though the instrument under which it is asserted was in existence at the time the policy was issued. Where a certificate of title issued by a title insurance company to a landowner, as to the title of the latter, recites that the guarantor shall not be liable for damages to exceed a certain sum, and shall defend the guarantee, or his successors or heirs, as to every claim adverse to the title guaranteed, and that, if the loss is less than all the land, the company shall only be liable for the proportionate share of the loss, and that the guarantor, in case it makes payments under the certificate, shall be subrogated to the rights of the guarantee, the instrument is a guaranty of title, and is not rendered a mere guaranty of the correctness of the certificate by the additional provision that the company guarantees the certificate to be correct. *Purcell v. Land Title Guarantee Co.*, 94 Mo. App. 5 (67 S. W. Rep. 726).

Sec. 342. Insurable interest. An averment of ownership, or of facts showing an insurable interest both at the time of the insurance and at the destruction of the property, is necessary to make a good complaint on a fire insurance policy. *Vernon Ins. & T. Co. v. Bank of Toronto*, 29 Ind. App. 678 (65 N. E. Rep. 23); *Ohio Farmers' Ins. Co. v. Vogel*, 30 Ind. App. 281 (65 N. E. Rep. 1056). See opinion for sufficiency of particular averments. No recovery can be had by the heirs of the record owner of property on a policy issued in his name after his death, without a reformation of such policy by a court of equity; but such reformation will be decreed where the facts justify it. *Taylor v. Glens Falls Ins. Co.*, Fla. (32 So. Rep. 887). The fact that a

contract by which one is given a license to erect a building on a railroad right of way stipulates that the railroad shall not be liable for its loss by fire, does not deprive the licensee of an insurable interest in the building. *Greenwich Ins. Co. v. Louisville & N. R. Co.*, 112 Ky. 598 (66 S. W. Rep. 411; 56 L. R. A. 477; 23 Ky. Law Rep. 2014). A vendor of property who has agreed to convey when the price stipulated has been paid has an insurable interest while part of the purchase money remains unpaid. *Continental Ins. Co. v. Brooks*, 131 Ala. 614 (30 So. Rep. 876).

Sec. 343. Insurable interest—Tenant by curtesy initiate. Construing and applying Mass. Pub. Stat., ch. 124, § 1; ch. 147, §§ 1-6, prior to enactment of Stat. 1900, ch. 450, it is held that a tenant by the curtesy initiate has an insurable interest in ordinary buildings on his wife's land. *Doyle v. American Fire Ins. Co.*, 181 Mass. 139 (63 N. E. Rep. 394). The court say: "The effect of our statutes and decisions is to leave the right of a tenant by the curtesy initiate like an inchoate right of dower. Prior to January 1, 1902, when Stat. 1900, ch. 450, took effect, the only difference between them was that the former covered the whole real estate of the wife, while the latter covered only one-third of the real estate of the husband, and accordingly the former took effect in possession immediately on the death of the wife, while the latter did not vest in possession until after it had been assigned. It is very plain on principle, and it has often been decided, that a tenant by the curtesy at the common law had an insurable interest in his wife's estate during her life. Whether a tenant by the curtesy before the death of his wife has an insurable interest under the statutes that govern this case is a question which it is not easy to answer. In Pennsylvania, under very similar statutes, a similar question has been answered in the affirmative. *Harris v. Insurance Co.*, 50 Pa. 341. In *Clark v. Insurance Co.* 81 Me. 373 (17 Atl. Rep. 303), it is held that under the statutes of Maine, on the death of a wife, her husband takes an interest in her real estate by descent, and that prior to her death he has not an insurable interest in the property. He is treated like an ordinary heir at law, who has a mere expectancy, even though there are limitations upon the power of the wife to deprive the husband of his share by a will or deed without his consent. A similar decision was made in Indiana under a similar statute. In-

insurance Co. v. Newman, 120 Ind. 554 (22 N. E. Rep. 428); Rev. Stat. Ind. (Ed. 1881) §§ 2485, 5117. See, also, Insurance Co. v. Montague, 38 Mich. 548 (31 Am. Rep. 326). In the Massachusetts cases there is no adjudication on the question, but there are strong intimations that it should be answered in the affirmative. Kyte v. Assurance Co., 144 Mass. 43 (10 N. E. Rep. 518); Oakes v. Insurance Co., 131 Mass. 164-166. It is well settled that a vested title to property, legal or equitable, is not necessary to give one an insurable interest in it. Eastern R. Co. v. Relief Fire Ins. Co., 98 Mass. 420, 423; Williams v. Insurance Co., 107 Mass. 377 (9 Am. Rep. 41); Wainer v. Insurance Co., 153 Mass. 335-341 (26 N. E. Rep. 877; 11 L. R. A. 598); Hayes v. Insurance Co., 170 Mass. 492 (49 N. E. Rep. 754); Redfield v. Insurance Co., 56 N. Y. 354 (15 Am. Rep. 424); Rohrbach v. Insurance Co., 62 N. Y. 47 (20 Am. Rep. 451); Hooper v. Robinson, 98 U. S. 528 (25 L. Ed. 219); Warren v. Insurance Co., 31 Ia. 464 (7 Am. Rep. 160). We think that the tendency of the modern decisions is to relax the stringency of some of the earlier cases, and to admit to the protection of the contract all property standing in such a relation to the person seeking insurance that its loss would probably directly affect his pecuniary condition. Under the statutes that we are considering, a tenant by the curtesy initiate has an inchoate right, which is recognized and protected by law. Whether, in any case, it will become vested in a title, depends on a contingency. The existence of such a right in real estate which has been conveyed away by the wife is an incumbrance upon the property, within the meaning of the common covenant against incumbrances. A grantee holding such a covenant, who procures its release, may recover from his grantor any reasonable sum paid to remove the incumbrance. Harrington v. Murphy, 109 Mass 299. That the vesting of the right in an absolute title depends on a contingency does not affect the fact that it has a prospective value. So long as the right is recognized by the statute, this ought not to prevent the holder of it from bargaining for indemnity against its loss. The statutes in Pennsylvania and Massachusetts differ from those in Maine and Indiana by distinctly recognizing the rights of a tenant by the curtesy by name, while in the latter states tenancy by the curtesy is abolished, and the right of a husband depends on a statute of descent, and on a limitation of the right of a wife's disposal of her real estate. Under the

statutes of the two former states a husband's right by the curtesy can not be taken by the wife's creditors, either before or after her death. In that respect it is like a wife's right of dower. We are of opinion that under our statutes and decisions a tenant by the curtesy initiate has an insurable interest in ordinary buildings on his wife's land."

Sec. 344. Insurance by life tenant—By vendor or vendee—Application of proceeds of policy. Remaindermen are not entitled to the benefit of an insurance policy issued to the life tenant which purports to insure his interest only. *Bennett v. Featherstone*, 110 Tenn. 27 (71 S. W. Rep. 589). See opinion for discussion of this subject; also Vol. 5, *Ballard's Law of Real Prop.* §§ 402, 403. A vendor of a lot on which he has a lien for unpaid purchase money may insure for his own benefit buildings erected thereon by his vendee, and in case of loss the vendee has no interest in the insurance money and can not have it applied on the unpaid purchase price. *White v. Gilman*, 138 Cal. 375 (71 Pac. Rep. 436). A vendee of a real estate association paying the purchase price for land in installments, who has taken insurance on the improvements in compliance with his contract to "keep the improvements insured for the benefit of the association," in case of loss after payment of part of the installments and before maturity of the others, can not, without the consent of his vendor, require the application of the insurance money to the reduction of the indebtedness not yet due, when its amount, added to the value of the lot, does not equal the unpaid purchase money, but the vendor may apply it in restoring the property for the protection of its security. *Naquin v. Texas Sav. & Real Estate Inv. Ass'n*, 95 Tex. 313 (67 S. W. Rep. 85; 58 L. R. A. 711; 93 Am. St. Rep. 885). The court say: "The debt not being due, the money collected upon the insurance policy could not be applied to its liquidation except by the consent of the creditor and the debtor. The debtor had no more right to demand the application of the money to the satisfaction of those installments which had not fallen due without the consent of the payee of the obligation than the payee had to apply it to the satisfaction of the unmatured indebtedness against the wishes of the mortgagor. The rights of the parties were reciprocal under the contract. In this situation, the purpose of the parties in creating the insurance out of which this fund arose was attained by a restoration of the house, thereby

placing them in the same situation they were in before the fire. In a sense, the investment association held the money in trust for the payor, but with an interest of its own to be protected, and it could not be required to deliver over the fund to Naquin, for that would be to surrender its security for the unmatured debt. Duty did not permit it to serve its own interests only, nor require it to give up its rights to exclusively benefit the debtor, but required that it use the fund to carry out the purposes for which it was provided.

In the case of *Gordon v. Bank*, 115 Mass. 591, the court expresses the rule of law which governs in such cases in the following language: 'The insurance was for indemnity to the mortgagor as well as to the mortgagee. To the mortgagee, it was for protection of the security, not for payment of the debt. It was collateral to the debt. Money received from the insurance took the place of the property destroyed, and was still collateral until applied in payment by mutual consent, or by some exercise by the mortgagee of the right to demand payment of the debt, and upon default of payment, to convert the securities.' In that case there was a second mortgage upon the property not included in the indemnity of the insurance. The savings bank and Gordon agreed to the investment of the fund in another house, but the second mortgagee insisted that the destruction of the property and the collection of the insurance was, in law, a satisfaction of the debt to the extent of the sum collected. While the case is not exactly in point with that now under consideration, we think it supports our conclusion in this case. The junior mortgagee had a right to have the money rightly applied for the protection of his interests, which could be done by discharging the first debt or by rebuilding the house. The bank was under obligation to the junior mortgagee to keep the money and apply it to the debt or to see that it was used to restore the security. That case establishes the character of the fund, from which springs the duty of the appellee to appellant, and the right to protect itself as well as Naquin. In *Fergus v. Wilmarth*, 117 Ill. 547 (7 N. E. Rep. 508), the insurance was placed upon the house, and, by the insured, the policy was assigned to Fergus as trustee, to hold for the indemnity of a debt secured by mortgage upon the property. The house having been destroyed by fire, the trustee collected the fund, and placed it in bank to await a proper application of it under the trust. The creditor

demanding the payment of the money upon his debt, which was not due. The debtor insisted upon building another house upon the ground. The trustee refused to turn the fund over to the mortgagor or to pay it to the mortgagee upon the debt, but agreed to pay it to the former whenever he should complete the building so that sufficient insurance could be had upon it to replace the indemnity to the mortgagee that was afforded by that policy. The bank failed, and a part of the money was lost. It was sought to hold the trustee liable. The supreme court of Illinois held that the trustee acted properly in the discharge of his duty, and was not liable for the loss by failure of the bank. The principle decided in that case embraces the very heart and core of the question, did the appellee properly apply the money by protecting the rights of both parties? We have answered that question in the preceding part of this opinion, but will restate the proposition briefly. Under the circumstances of the case, it was the duty of the appellee to use the fund for the best interests of both parties, which were best served by rebuilding the house, whereby the security was preserved intact for the indemnity of both."

Sec. 345. Rights of mortgagor and mortgagee.

The assignment by a mortgagee of his right in an insurance policy issued to his mortgagor, but made payable to the mortgagee as his interest might appear, is not an assignment of the policy, within the meaning of a clause therein prohibiting an assignment thereof without the insurer's consent, the mortgagor continuing to be the custodian of the property. *Bree-year v. Rockingham Farmers' Mut. Fire Ins. Co.*, 71 N. H. 445 (52 Atl. Rep. 860). A mortgagee to whom an insurance policy has been assigned as collateral security holds any funds arising therefrom in excess of his debt in trust for the mortgagor; and where there has been a partial destruction of the property after foreclosure sale of it under the mortgage, pending the confirmation of the sale, the mortgagor may have an action against the mortgagee to compel him to surrender the policy. *Heinz v. German Fire Ins. Co.*, 95 Md. 160 (51 Atl. Rep. 951). The fact that a mortgagee has the custody of a policy of insurance procured by his mortgagor on the mortgaged property and made payable to the mortgagee as his interest may appear and which contains a clause making it void if the property be mortgaged without the consent of the

insurer, does not charge such mortgagee with the duty of obtaining the consent of the insurer to a second mortgage of the property, so as to render him liable to account for the amount of the policy, upon foreclosure of his mortgage. *Union Sav. Bank & T. Co., v. Bedell*, 74 Vt. 108 (52 Atl. Rep. 270). A policy issued to the owner of property and made payable to his mortgagee as the latter's interest may appear, and subsequently assigned by him to his pledgee, is not avoided as against the latter by the owner's conveyance of the property in violation of the terms of the policy, where it contained a provision that, if payable to the mortgagee of the insured realty, no default of any one other than the mortgagee should affect his rights. *Breeyear v. Rockingham Farmers' Mut. Fire Ins. Co.*, 71 N. H. 445 (52 Atl. Rep. 860).

Sec. 346. Mortgage clause in policy. Where an owner of property which was destroyed by fire had taken out a number of insurance policies on the same, each of which contained a "mortgage clause," making the insurance payable to the mortgagee of the property; and the full value of the property destroyed was paid to such mortgagee by some of the insurance companies, such owner thereafter had no right of action against another insurance company, even if before the settlement of such loss it may have been liable to him upon such policy. *Norwich Fire Ins. Soc. v. Wellhouse*, 113 Ga. 970 (39 S. E. Rep. 397). Where a policy insuring mortgaged property, taken out by a mortgagor's assignee for the benefit of his creditors, contains a stipulation providing for the payment of any loss accruing thereunder to the "mortgagees, as their interest may appear—balance, if any," to the assignee, in case of a loss exceeding the mortgage indebtedness either the mortgagee or assignee of the mortgagor may maintain a separate action for the part belonging to him; but the burden is on the plaintiff in either case to establish the amount of the indebtedness due under the mortgage contract. *Insurance Co. v. Felrath*, 77 Ala. 194 (54 Am. Rep. 58), overruled. *Capital City Ins. Co. v. Jones*, 128 Ala. 361 (30 So. Rep. 674; 86 Am. St. Rep. 152). Where an insurance policy stipulated that "if, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee, * * * the conditions hereinbefore contained shall apply in the manner expressed in such provisions relating to such interest as shall be written on or attached hereto," it is held that a mortgagee

claiming under a clause "Loss, if any, payable to S., mortgagee, as his interest may appear," without any conditions applicable to the interest of the mortgagee being attached, may recover on the policy, and that his indemnity is independent of the conditions imposed on the insured in the body of the policy. *Christensen v. Fidelity Ins. Co.*, 117 Ia. 77 (90 N. W. Rep. 495; 94 Am. St. Rep. 286). Citing, *Oakland Home Fire Ins. Co. v. Bank of Commerce*, 47 Neb. 717 (66 N. W. Rep. 646; 36 L. R. A. 673; 58 Am. St. Rep. 663); *Queen Ins. Co. v. Dearborn Sav., Loan & Bldg. Ass'n*, 175 Ill. 115 (51 N. E. Rep. 717); *East v. Association*, 76 Miss. 697 (26 So. Rep. 691). In Michigan it is held that a mortgage clause "Loss, if any, payable to E. [a mortgagee] as interest may appear" attached to a policy issued to the owner of property does not create an independent contract with the mortgagee so as to exempt him from the effect of a forfeiture of the policy by the insured's violation of condition against transferring his title. *Jaskulski v. Citizens' Mut. Fire Ins. Co.*, 131 Mich. 603 (92 N. W. Rep. 98).

Sec. 347. Condition avoiding policy for lack of sole and unconditional ownership by insured. A policy on property owned by a husband and wife, written in his name alone, will not be held invalid after loss on account of the insured not being the sole owner, where the insured was not present when the policy was issued, made no representations as to the title, and the agent of the insurer apparently acted on his own information. *Sharp v. Scottish Union & Nat. Ins. Co.*, 136 Cal. 542 (69 Pac. Rep. 253). The interest of a vendee of realty under a land contract is "sole and unconditional ownership," within the meaning of a provision of a standard fire insurance policy requiring such ownership as a precedent to the validity of an insurance contract made in accordance therewith. *Matthews v. Capital Fire Ins. Co.*, 115 Wis. 272 (91 N. W. Rep. 675). Citing, *Insurance Co. v. Crockett*, 75 Tenn. 725, 729; *Insurance Co. v. Wilgus*, 88 Pa. 107, 110; *Chandler v. Insurance Co.*, 88 Pa. 223, 227; *Lewis v. Insurance Co.*, (C. C.) 29 Fed. Rep. 496 (24 Blatchf. 181); *Insurance Co. v. Hughes*, 47 C. C. A. 459 (108 Fed. Rep. 497); *Dupreau v. Insurance Co.*, 76 Mich. 615 (43 N. W. Rep. 585; 5 L. R. A. 671); *Loventhal v. Insurance Co.*, 112 Ala. 108 (20 So. Rep. 419; 33 L. R. A. 258;

57 Am. St. Rep. 17) ; Insurance Co. v. Estes, 106 Tenn. 472 (62 S. W. Rep. 149; 52 L. R. A. 915; 82 Am. St. Rep. 892).

Sec. 348. Condition avoiding policy for lack of sole and unconditional ownership by insured—Grantee in conveyance adjudged voluntary as to grantor's creditors. A decree adjudging a conveyance to be voluntary, and subjecting the property conveyed, if necessary, after exhausting the grantor, to the payment of the judgment in favor of the grantor's creditors, does not avoid a subsequent policy of insurance issued to the grantee, although it contains a stipulation that the policy shall be void "if the interest of the insured be other than unconditional and sole ownership." *Steinmeyer v. Steinmeyer*, 64 S. C. 413 (42 S. E. Rep. 184; 59 L. R. A. 319; 92 Am. St. Rep. 809). The court say: "In this case it appears that there was no change of interest between the issuance of the policy and the fire. The other conditions relate to the interest or ownership of the insured at the time of the insurance. Such conditions are reasonable and valid, and a breach of them should prevent a recovery. In *1 May, Ins.* § 283, the author says: 'Inquiries about a greater or less interest and a more or less perfect title usually refer to the quality of the estate, having reference to its duration,—whether an estate in fee, for life, for years or at will,—to what is vested in distinction from what is conditional or contingent, and not to questions of incumbrances, as affecting the quantity of estate.' The question, then, is, what was the interest of the insured, and was her ownership sole and unconditional, with respect to the insurance company, at the time of the insurance? The title of a grantee in a voluntary conveyance by the owner is good against the grantor and all the world, subject to the equity of the grantor's creditors to have the property, if necessary, applied to the payment of their judgment against the grantor. In the absence of actual fraud, as in this case, a voluntary deed is not void *ab initio*, and it is unassailable even by the creditors of the grantor until it is legally ascertained that the property is necessary to pay the creditor after exhausting the grantor. *Suber v. Chandler*, 18 S. C. 529. Then it is void only as against the right of the creditor to subject it to his judgment. When it is said that such a voluntary deed is 'void' or 'set aside,' these terms must be understood as meaning only that the conveyance, while good against all others, shall not operate to defeat the equity

of the creditors of the grantor. With respect to any right of the insurance company, the insured, by the grant of the owner, was invested with the fee-simple title at the time of the insurance. The insured's ownership was sole because no one else had any interest in the property as owner, and it was unconditional because the quality of her estate therein was not limited or affected by any condition. The right of the grantor's creditors in certain contingencies to subject said property to their claims did not give such creditors any interest in the property as owners, nor did the judgment declaring the deed void as against creditors operate to restore the fee to the grantor, with respect to the insurance company. The status of the voluntary grantee at the time of the insurance was rather that of one holding the fee subject to an incumbrance, the equity of the grantor's creditors. The existence of a lien or incumbrance on the insured's property is not a breach of the condition which requires sole and unconditional ownership. *Insurance Co. v. Weill*, 28 Grat. 389 (26 Am. Rep. 364); *Carrigan v. Insurance Co.*, 53 Vt. 418 (38 Am. Rep. 687); *Carson v. Insurance Co.*, 43 N. J. L. 300 (39 Am. Rep. 584); *Hubbard v. Insurance Co.*, 33 Ia. 325 (11 Am. Rep. 125); *Dolliver v. Insurance Co.*, 128 Mass. 315 (35 Am. Rep. 378). It does not appear that any inquiries were made by the insurance company as to the existence of incumbrances against the property, and no representations were made by the insured touching her interest in said property except what would be involved by the use of the terms of the conditions considered. The insured was in the use and possession of the premises under said deed at the time of the insurance, and clearly had an insurable interest therein; and it is difficult to say how she could have described her interest or estate in the property other than as sole and unconditional owner. All would admit that she would have been such an owner if the claims of the grantor's creditors had been paid by any one, or in any way released or discharged, before sale of the premises. But as the creditors had no title in the premises to convey, how could the mere payment of their claims add anything to the insured's title, beyond merely removing an incumbrance? Under the circumstances, the position of the insured was not essentially different than would be the position of any debtor insuring property held in fee simple, but subject to an outstanding mortgage or judgment lien. Such outstanding incumbrances may undoubtedly affect the risk, but the insurance company may, if it

sees fit to do so, protect itself against such risks by appropriate stipulations in the contract."

Sec. 349. Condition in policy against change in insured's title by alienation or incumbrance. A forfeiture of a policy can not be claimed on account of a conveyance of the property, which is ineffectual because a delivery of it was obtained by fraud. *Hartford Fire Ins. Co. v. Warbritton*, 66 Kan. 93 (71 Pac. Rep. 278). A contract for the sale of insured property does not constitute a change in the interest or title thereof, within the meaning of a stipulation in the insurance policy by which it should become void if any such change should take place. *Home Mut. Ins. Co. v. Tomkies*, 30 Tex. Civ. App. 404 (71 S. W. Rep. 812). An insurance policy covering both real estate and chattels is not avoided as to the former by the insured's violation of a condition against incumbrances by his executing a chattel mortgage on the personal property. *Taylor v. Anchor Mutual Fire Ins. Co.*, 116 Ia. 625 (88 N. W. Rep. 807; 93 Am. St. Rep. 261). A condition in a policy that it should be void "if any change" should take place "in the interest, title, or possession" of the property, "whether by legal judgment or process or by voluntary act of the insured or otherwise," is not violated by the insured executing a mortgage on the property; and the same rule applies where he gives an absolute deed intended by all the parties to operate as a mortgage. *Wolf v. Theresa Village Mut. Fire Ins. Co.*, 115 Wis. 402 (91 N. W. Rep. 1014). Citing, *Insurance Co. v. Spankneble*, 52 Ill. 53 (4 Am. Rep. 582); *Insurance Co. v. Walsh*, 54 Ill. 164 (5 Am. Rep. 115); *Insurance Co. v. Gibe*, 162 Ill. 251 (44 N. E. Rep. 490); *Nease v. Insurance Co.*, 32 W. Va. 283 (9 S. E. Rep. 233); *Barry v. Insurance Co.*, 110 N. Y. 1 (17 N. E. Rep. 405); *Bank of Glasco v. Springfield Fire & Marine Ins. Co.*, 5 Kan. App. 388 (49 Pac. Rep. 329); *Fire Office v. Clark*, 53 O. St. 414 (42 N. E. Rep. 248; 38 L. R. A. 562); *Peck v. Insurance Co.*, 16 Utah, 121 (51 Pac. Rep. 255; 67 Am. St. Rep. 600). A condition in a policy avoiding it if there be an alienation of the property, and providing that the commencement of foreclosure proceedings shall be deemed an alienation, is valid; and the service of a petition of foreclosure on the insured is the commencement of the proceedings. *Findlay v. Union Mut. Fire Ins. Co.*, 74 Vt. 211 (52 Atl. Rep. 429; 93 Am. St. Rep. 885). A policy expressly providing that "loss, if any,

is payable to S., mortgagee," containing a condition avoiding it in case foreclosure proceedings should be commenced on any of the property with the knowledge of the insured, is not invalidated by the commencement of an action to foreclose in which no summons was issued, which was dismissed, upon renewal of the mortgage, all without the knowledge of the insured. *Sharp v. Scottish Union & Nat. Ins. Co.*, 136 Cal. 542 (69 Pac. Rep. 253).

Sec. 350. Forfeiture of policy by vacancy of premises—Revival of policy by reoccupancy. Where there is such a vacancy of property as will render void a policy under the conditions contained in it, the policy is forfeited, and it is not revived by a reoccupancy of the property before a loss occurs. *Hoover v. Mercantile Town Mut. Ins. Co.*, 93 Mo. App. 111 (69 S. W. Rep. 42); *German Ins. Co. v. Russell*, 65 Kan. 373 (69 Pac. Rep. 345; 58 L. R. A. 234). In the last case the court say: "In the case of *Moore v. Insurance Co.*, 62 N. H. 240 (13 Am. St. Rep. 556), it was held that: 'A policy rendered void by the violation of a condition that the insured building shall not be unoccupied for a period of more than ten days without the insurer's consent indorsed on the policy is not revived by the subsequent occupation of the building.' In the above case, the building was occupied at the time of the fire, although it had been vacant more than ten days at one time prior to the fire. On page 246, the court uses this language: 'The strict literal meaning of the stipulation that the policy shall be void if the premises remain unoccupied more than ten days is not that the insurance will be suspended merely during nonoccupation after the ten days, and will revive when occupation is resumed. In ordinary speech, a void policy is one that does not, and will not, insure the holder, if the insurer seasonably asserts its invalidity. It might be argued that this clause should be so construed as to accomplish no more than the purpose for which it was inserted; that its sole purpose was to protect the insurer against the risk resulting from nonoccupation; and that, if this risk was terminated by reoccupation, the parties intended the insurance should be suspended only during the existence of the cause of the risk which the company did not assume. On the other hand, it might be argued that such an intention would have been manifested by words specially and expressly providing for a suspension and resumption of the insurance, and would

not have been left to be inferred from the general agreement that the policy should be void; that a final termination of the insurance at the end of ten days of nonoccupation is plainly expressed by the provisions that the policy shall then be void; and that the parties would not think it necessary to go further, and provide that the void policy should not become valid on reoccupation.' If the provision of the policy in question is to be given any significance it is not material that the property was destroyed after re-occupancy. Nonoccupancy without the consent of the company forfeited the policy. Of what consequence, therefore, is it that, before loss, the property is re-occupied?"

Sec. 351. "Total loss" defined. Under the standard fire insurance policy, total loss is to be ascertained as of the date of the occurrence, and as determined by the following tests: A building is not a total loss unless it has been so far destroyed by the fire that no substantial part or portion of it above the foundation remains in place capable of being safely utilized in restoring the building to the condition in which it was before the fire. The words "total loss," when applied to a building, mean totally destroyed as a building; that is, that the walls, although some portion of them remain standing, are unsafe to use for the purpose of rebuilding, and would have to be torn down, and a new building erected throughout. There can be no total loss of a building so long as the remnant of the structure left standing above the foundation is reasonably and safely adapted for use (without being taken down) as a basis upon which to restore the building to the condition in which it was immediately before the fire; and whether it is so adapted depends upon the question whether a reasonably prudent owner of a building uninsured, desiring such a structure as the one in question was before the fire, would, in proceeding to restore the building, utilize such standing remnant as such basis. *Northwestern Mut. Life Ins. Co. v. Rochester German Ins. Co.*, 85 Minn. 48 (88 N. W. Rep. 265; 56 L. R. A. 108). See opinion for exhaustive discussion of this subject and application of the rules announced to particular facts. This case is approved and followed in *Northwestern Mut. Life Ins. Co. v. Sun Ins. Office*, 85 Minn. 65 (88 N. W. Rep. 272); *Poppitz v. German Ins. Co.*, 85 Minn. 118 (88 N. W. Rep. 438).

Whether a loss by fire of property covered by a policy of insurance is total or partial is ordinarily a question of fact for the jury. *Liverpool & L. & G. Ins. Co. v. Heckman*, 64

Kan. 388 (67 Pac. Rep. 879). Citing, *Corbett v. Insurance Co.*, 85 Hun, 250 (32 N. Y. Supp. 1059); *Ampleman v. Insurance Co.*, 35 Mo. App. 308; *Ampleman v. Insurance Co.*, 35 Mo. App. 317. In the principal case the court, in discussing the subject of "total loss," say: "The phrase 'total loss,' or 'wholly destroyed,' as used when applied to the subject of insurance, does not contemplate the entire annihilation or extinction of the property insured. Neither does it require that any portion of the property remaining after loss shall have no value for any purpose whatever, but does mean only that destruction of the property insured to such extent as to deprive it of the character in which it was insured. Although some portion of the building may remain after the fire, yet if such portion can not be reasonably used to advantage in the reconstruction of the building, or will not, for some purpose, bring more money than sufficient to remove the ruins, such building is, in contemplation of the law, a 'total loss,' or 'wholly destroyed.'" 2 May, Ins. (4th Ed.) 421a; *Lindner v. Insurance Co.*, 93 Wis. 526 (67 N. W. Rep. 1125); *Insurance Co. v. McIntyre*, 90 Tex. 170 (37 S. W. Rep. 1068; 35 L. R. A. 672; 59 Am. St. Rep. 797, and note); *Corbett v. Insurance Co.*, 155 N. Y. 389 (50 N. E. Rep. 282; 41 L. R. A. 318); *Williams v. Insurance Co.*, 54 Cal. 442 (35 Am. Rep. 77); *Havens v. Insurance Co.*, 123 Mo. 403 (27 S. W. Rep. 718; 26 L. R. A. 107; 45 Am. St. Rep. 570)."

IRRIGATION.

EPITOME OF CASES.

Sec. 352. What constitutes an appropriation of water
—Appropriation by erection of dams and dikes. To constitute a valid appropriation of water there must be an actual diversion of the same, with intent to apply it to a beneficial use, followed by an application to such use within a reasonable time. *Walsh v. Wallace*, 26 Nev. 299 (67 Pac. Rep. 914); *Carter v. Wakeman*, 42 Or. 147 (70 Pac. Rep. 393). An application of water for irrigation is effected, within the meaning of the constitution of Colorado, when actually applied to land

for that purpose. *Wellington v. Beck*, 30 Colo. 409 (70 Pac. Rep. 687).

An appropriation of water may be effected by the erection of dams and dikes by the appropriator by means of which he confines the water to the channel of the stream, thus conveying it down to his land where he uses it for necessary and reasonable irrigation. *McCall v. Porter*, 42 Or. 49 (70 Pac. Rep. 820). The court say: "'The true test of appropriation of water, in its legal aspect,' says Mr. Long, 'is the successful application of the water to the beneficial use designed; the method of diverting or carrying it or of making the application being wholly immaterial. It is not even necessary that ditches be used. Thus, if a dam or other contrivance will suffice to turn the water from the stream, and moisten the lands sought to be cultivated, this is sufficient, although no ditch be needed or constructed.' Long, Irr. § 49. And in *Thomas v. Guiraud*, 6 Colo. 530, which was cited with approval by this court in *Ditch Co. v. Bennett*, 30 Or. 59 (45 Pac. Rep. 472; 60 Am. St. Rep. 771), it is said by Mr. Justice Helm, in speaking on this question, that: 'If a dam or contrivance of any kind will suffice to turn water from the stream and moisten the lands sought to be cultivated, it is sufficient, though no ditch is needed or constructed. Or if land be rendered productive by the natural overflow of the water thereon, without the aid of any appliances whatever, the cultivation of such land by means of the water so naturally moistening the same is a sufficient appropriation of such water, or so much thereof as is reasonably necessary for such use. The true test of appropriation of water is the successful application thereof to the beneficial use designed, and the method of diverting or carrying the same, or making such application, is immaterial.' In making the diversion, or in conducting the water appropriated, use may be made of dry ravines or natural depressions, and, indeed, a natural stream may be so used. *Simmons v. Winters*, 21 Or. 35 (27 Pac. Rep. 7; 28 Am. St. Rep. 727); *Pom. Rip. Rights*, § 48; *Ditch Co. v. Vaughn*, 11 Cal. 143 (70 Am. Dec. 769); *Richardson v. Kier*, 37 Cal. 263). So that Martin and the defendants are not prevented from acquiring the right to the use of the water by prior appropriation merely because they used a part of the natural channel of Buck creek to convey the water diverted by them from the so-called eastern or McCall branch. All that is necessary to make a valid appropriation is that there be an actual diversion of the water from

the natural channel or other source of supply, with an intent to apply it to some beneficial use, followed by an actual application to the use designed within a reasonable time. *Low v. Rizor*, 25 Or. 551 (37 Pac. Rep. 82); *Ditch Co. v. Bennett*, 30 Or. 59 (45 Pac. Rep. 472; 60 Am. St. Rep. 777). The appropriation depends upon the actual capture of the water and its application to some useful or beneficial purpose, and not upon the mode or method by which the appropriation or diversion is made. If one prevents a stream from overflowing its banks at the low places by means of dams or dikes, or by the same means prevents the water from flowing out through a natural channel or depression leading off from the main stream, thus confining it to the channel and conveying it down to his land below, where he uses it for necessary and reasonable irrigation, his acts will amount to as valid an appropriation of the water so diverted or confined as if he had in fact conducted it to his land through an artificial ditch or conduit."

Sec. 353. Appropriation—Extent of right—Change of point of diversion. Construing and applying S. Dak. Comp. Laws, § 2771, defining riparian rights substantially in the terms of the common law, it is held that the statute permits riparian owners to use a reasonable quantity of water flowing over or along their lands for irrigating the same; and appropriators of water whose rights were acquired subsequent to those of an upper riparian owner can not complain of the use by such owner of the water for irrigation purposes. *Lone Tree Ditch Co. v. Cyclone Ditch Co.*, 15 S. Dak. 519 (91 N. W. Rep. 352). See opinion for collation and review of authorities on this subject. In California, the right to appropriate water by the diversion of a stream can not be acquired against riparian proprietors otherwise than by prescription, which requires an adverse user for five years. *Rice v. Meiners*, 136 Cal. 292 (68 Pac. Rep. 817). There may be two uses of the same water under a primary and secondary appropriation where neither one necessarily interferes with the other, and both uses are beneficial to the public. In such case the prior appropriator can not complain simply because of the secondary use, but he has a right to insist that the water shall be subject to his use and enjoyment to the extent of his appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropriation. Above his head-

gates, however, the water in the stream or lake is not his personal property, and he does not become the owner of it until he acquires control of it in artificial ditches or reservoirs. *Salt Lake City v. Salt Lake City Water & Elec. Power Co.*, 24 Utah, 249 (67 Pac. Rep. 672; 61 L. R. A. 648); *Id.*, 25 Utah, 456 (71 Pac. Rep. 1069). Utah Const., art. 11, § 6, prohibiting the leasing, selling, aliening, or disposing of water-works, water rights, or sources of water supply by municipalities, does not prohibit the acquisition of a secondary water right against a municipality. *Salt Lake City v. Salt Lake City Water & Elec. Power Co.*, 24 Utah, 249 (67 Pac. Rep. 672; 61 L. R. A. 648). Under a statute (Wash. Laws, 1873, p. 520) authorizing persons having possessory rights to agricultural land to appropriate water for irrigation and making "said land available for agricultural purposes to the full extent of the soil thereof," appropriation of sufficient water for the whole tract will relate back to the first diversion, in case the water is used continuously, and the area of cultivation is extended with reasonable diligence. *Longmire v. Smith*, 26 Wash. 439 (67 Pac. Rep. 246; 58 L. R. A. 308). Where the point of diversion is fixed by decree, and thereafter in another suit, wherein the parties to the first decree are parties with many others, and in the latter suit the water awarded to the parties to the first decree is scaled down, and the point of diversion thereof is not changed, such point can not be changed if others are injured thereby. *Walker v. McGinness*, *Ida.* (69 Pac. Rep. 1003).

Sec. 354. Appropriation—Priorities. The first appropriator of the water of a natural stream has a prior right to such water to the extent of his appropriation. *Wellington v. Beck*, 30 Colo. 409 (70 Pac. Rep. 687). A prior appropriator of water has a vested right in the use of the water appropriated by him, with which no court or subsequent appropriator can interfere. *Salt Lake City v. Salt Lake City Water & Elec. Power Co.*, 24 Utah, 249 (67 Pac. Rep. 672; 61 L. R. A. 648). The right of a prior appropriator to water is to get his allotted supply without unreasonable inconvenience because of the effect of subsequent appropriations. *Farmers' & Merchants' Irr. Co. v. Cozad Irr. Co.*, *Neb.* (90 N. W. Rep. 951). Appropriators of water have priority of rights in the chronological order of their appropriations; and one who acquires rights subsequent to another can not question

the prior appropriator's right to the amount of water actually diverted and used by him on the ground that such an appropriation may interfere with some one else's rights. The validity of such an appropriation as against subsequent owners does not depend upon, and is not affected by, the fact that there may be prior vested rights on the stream, either above or below. *McCall v. Porter*, 42 Or. 49 (70 Pac. Rep. 820). An appropriator does not forfeit his right to use the water by the fact that he has not put it to actual use, where he has prosecuted the construction of the necessary ditches and flumes with reasonable diligence, but had been prevented from making use of the water by the opposition of prior appropriators. *Salt Lake City v. Salt Lake City Water & Elec. Power Co.*, 24 Utah, 249 (67 Pac. Rep. 672; 61 L. R. A. 648).

On who seeks to appropriate water seeping through soil, having its source in springs which from their location presumably operate to feed a stream, the whole volume of which has been previously appropriated by another, has the burden of showing that such water forms no part of the volume of such stream. *Howcroft v. Union & Jordan Irr. Co.*, 25 Utah, 311 (71 Pac. Rep. 487). A prior appropriator of the waters of a stream may have an injunction against another appropriating the water of another stream constituting the source of the stream in which he has a prior right of appropriation, though the connection of the streams is by an invisible subterranean channel, where the flow and character of the water in the defendant's stream were reflected in those of plaintiff, and there was no other source from which such streams could be reasonably presumed to have been supplied, and there was no other known outlet to defendant's stream. See opinion for particular evidence held to sustain such a right. *Medano Ditch Co. v. Adams*, 29 Colo. 317 (68 Pac. Rep. 431).

Sec. 355. Acquiring water rights by adverse use. To sustain a claim of a prescriptive right to a ditch over the land of another the claimant must present clear and distinct evidence of the extent to which the user has been exercised. *Strong v. Baldwin*, 137 Cal. 432 (70 Pac. Rep. 288). An answer by a defendant in an action against him for diversion of water based on a prescriptive right, is insufficient where it fails to allege that the use was adverse to plaintiff, or that plaintiff had notice of the occupancy, or facts sufficient to charge him with notice thereof. *Churchill v. Louie*, 135 Cal.

608 (67 Pac. Rep. 1052). One diverting water may acquire a prescriptive right thereto, as against a riparian owner, in the same time necessary to acquire land by adverse possession. If there is actual and exclusive possession of the water with intent to use it, and actual use, within a reasonable time, the prescription dates from the diversion; and the continuity of the holding by one diverting water is not interrupted by objection thereto which is ignored by the adverse claimant. *Oregon Const. Co. v. Allen Ditch Co.*, 41 Or. 209 (69 Pac. Rep. 455; 93 Am. St. Rep. 701, see pp. 711-732 for exhaustive note on "Prescriptive title to water"). In Idaho, in order to obtain a prescriptive right to the use of water, the use on which such claim is based must be adverse to the rights of the owner, and must be accompanied by all of the elements necessary to constitute adverse possession and use. Such a right can not be acquired by the use of water with the consent or permission of the owner, or where the statute law requires him to let others use it. *Hall v. Blackman*, Ida. (68 Pac. Rep. 19).

Sec. 356. Conveyance of water rights. A water right appurtenant to land passes by a conveyance thereof. *Hall v. Blackman*, Ida. (68 Pac. Rep. 19); *American Nat. Bank v. Hoeffler*, Colo. App. (70 Pac. Rep. 156). An instrument purporting to "transfer, sell, release," and "transfer, sell, assign and set over" permits to construct an irrigating ditch are sufficient to pass title between the parties, though not acknowledged and recorded. Wyo. Rev. Stat., §§ 2731, 2741, 2762, 2770 construed and applied. *Whalon v. North Platte Canal & Colonization Co.*, Wyo. (71 Pac. Rep. 995). Utah Const., art. 11, § 6, prohibiting the alienation, by a municipal corporation, of any water rights acquired by it for the use or benefit of its inhabitants, has no application to the acquisition by a power company of the right to connect its flume with the water canal of a city for the purpose of discharging water therein. *Salt Lake City Water & Elec. Power Co. v. Salt Lake City*, 25 Utah, 441 (71 Pac. Rep. 1067).

Sec. 357. Actions and adjudications concerning water rights. A complaint for the obstruction of a water easement, which alleges the plaintiff's ownership thereof, need not state how it was acquired, but it must definitely describe and define the easement. *Carter v. Wakeman*, 42 Or. 147

(70 Pac. Rep. 393). An irrigation company owning a canal may have an injunction against a threatened trespass thereon and the breaking of its headgates which would result in irreparable damage; and a cross bill by the defendant alleging his prior appropriation and ownership of the water is demurrable on account of not being germane to the principal suit. *Hayoia v. Salt River Valley Canal Co.*, Ariz. (71 Pac. Rep. 944). A defendant in an action against him for the diversion of water from an irrigating ditch, the complaint in which contains a necessary allegation of the plaintiff's ownership of the ditch, may, under a general denial, introduce a written contract tending to show a joint ownership with the plaintiff. *Mau v. Stoner*, 10 Wyo. 125 (67 Pac. Rep. 618). An answer by a defendant in an action to enjoin him from diverting a stream used by both him and the plaintiff for irrigation purposes, which alleges an appropriation prior to that of the plaintiff, followed by a continuous use which at certain times consumed the flow of the stream, alleges such a prior appropriation as constitutes a defense. *Wellington v. Beck*, Colo. 409 (70 Pac. Rep. 687). Neither a plea of prescription nor estoppel asserted as a defense to an action to restrain the diversion of water can be sustained in the absence of a finding that some definite quantity of water was diverted. *Hayes v. Silver Creek & P. Land & Water Co.*, 136 Cal. 238 (68 Pac. Rep. 704). A conditional decree in an action adjudicating priorities of water rights is not void; nor does the failure of the court to follow the statute in numbering of the ditches and awarding the priorities render the decree void so as to be subject to collateral attack. *Lake Fork Ditch Co. v. Haley*, 28 Colo. 513 (67 Pac. Rep. 158). A decree in an equitable action to determine conflicting claims of right to the use of water should definitely fix their respective rights. *Walsh v. Wallace*, 26 Nev. 299 (67 Pac. Rep. 914). See *Longmire v. Smith*, 26 Wash. 439 (67 Pac. Rep. 246; 58 L. R. A. 308). For cases determining particular questions as to admissibility of evidence in action for diversion of water, see *Gotelli v. Cardelli*, 26 Nev. 382 (69 Pac. Rep. 8); *Barnes v. Gerberg*, 27 Wash. 126 (67 Pac. Rep. 568). As to what constitutes a variance between complaint and proof, see *Branstetter v. Williams*, Ida. (67 Pac. Rep. 800). *Mills' Ann. Colo. Stat.*, § 2427 construed and applied—appeal from decree establishing water rights. *Randall v. Rocky Ford Ditch Co.*, 29 Colo. 430 (68 Pac. Rep. 240). Jurisdiction of equity in irri-

gation cases. *Andrews v. Irrigation Dist.*, Neb. (92 N. W. Rep. 612).

Sec. 358. Miscellaneous notes—Statutes construed.

The increase in the flow of a spring tributary to a stream the water rights in which belong to others, belongs to the owner of the land on which the stream is situated, where such increase is the result of his enlargement of the spring. *Churchill v. Rose*, 136 Cal. 576 (69 Pac. Rep. 416). One who enters upon the ground of another upon which he was using the waters of a stream for placer mining purposes, and, without his knowledge or consent, by the construction of a ditch, diverts such water after it has passed over the placer flume, but before its return to the stream, in which diversion such owner acquiesced, acquires only the rights of a licensee, and his grantee can not enjoin the pollution of the stream by the turning of another body of water into it. *Fairplay Hydraulic Min. Co. v. Weston*, 29 Colo. 125 (67 Pac. Rep. 160). For particular cases determining rights of appropriators of water where a subsequently organized corporation takes charge of the distribution thereof, see *Fuller v. Azusa Irr. Co.*, 138 Cal. 204 (71 Pac. Rep. 98); *Hildreth v. Monticello Creek Water Co.*, Cal. (70 Pac. Rep. 672).

For construction of Cal. Stat. 1887, p. 29, known as the "Wright Act," see *Stimson v. Alessandro Irr. Dist.*, 135 Cal. 389 (67 Pac. Rep. 496); *Baxter v. Dickinson*, 136 Cal. 185 (68 Pac. Rep. 601). Colo. Laws 1887, p. 308 construed and applied—refusal to furnish water as a crime—sufficiency of indictment. *Schneider v. People*, 30 Colo. 493 (71 Pac. Rep. 369). Colo. Laws 1899, p. 235, §§ 1, 2 construed and applied—changing point of diversion—statutory procedure. *New Cache La Poudre Irr. Co. v. Water Supply & Storage Co.*, 29 Colo. 469 (68 Pac. Rep. 781). Ida. Laws 1899, p. 380 construed and applied—complaint to compel canal company to furnish water. *Bardsly v. Boise Irr. & Land Co.*, Ida. (67 Pac. Rep. 428). Wash. Laws 1889-90, p. 671; Laws 1895, p. 432, construed and applied—organization or irrigation districts and issue of bonds. *Kinkade v. Witherop*, 29 Wash. 10 (69 Pac. Rep. 399). Wyo. Rev. Stat., §§ 917-929 construed and applied—permit to construct irrigating ditch—priority. *Whalon v. North Platt Canal & Colonization Co.*, Wyo. (71 Pac. Rep. 995).

JUDICIAL SALES.

EPITOME OF CASES.

Sec. 359. Notice of sale. A judicial sale will not be set aside merely because the notice of sale does not state the amount due on the decree. *Dedrick v. Gillespie*, 63 Neb. 422 (88 N. W. Rep. 659). The published notice of a judicial sale is not fatally defective because one who is not a party to the decree is named in the notice among a large number of defendants. *Omaha Land & T. Co. v. Keck*, 63 Neb. 266 (88 N. W. Rep. 520). Notice of a judicial sale is not invalid because the newspaper in which it was inserted, although published in the proper county, was partly printed outside of such county. *Aetna Life Ins. Co. v. Wortasewski*, 63 Neb. 636 (88 N. W. Rep. 855). A sale made under a decree requiring notice to be published for at least four weeks prior to the sale and written or printed notices posted in at least ten of the most public places in the neighborhood and in the county where the land was situated, will be set aside where the notice was published four times but the first publication was not four weeks before the sale, and none of the posted notices were posted for the required length of time or in the neighborhood of the property. *Quick v. Collins*, 197 Ill. 391 (64 N. E. Rep. 288).

Sec. 360. Title and rights of purchaser. A purchaser of property at a judicial sale gets only the title and interest held by the original owner, subject to like equities and defects of title. *Gray v. Denson*, 129 Ala. 406 (30 So. Rep. 595). He does not acquire any right to the deeds constituting the chain of title to the land, in the hands of the original owner. *Gay v. Warren*, 115 Ga. 733 (42 S. E. Rep. 86; 90 Am. St. Rep. 151). A purchaser is entitled to have unpaid taxes which are a lien on the property paid out of the proceeds of sale. *Brown v. Timmons*, 110 Tenn. 148 (72 S. W. Rep. 958).

Title acquired under a judicial sale can not be collaterally assailed for inadequacy of price paid. *Worthington v. Miller*, 134 Ala. 420 (32 So. Rep. 748).

Under Cal. Code Civ. Proc., § 957, upon the reversal of a judgment under which the property has been sold on execution, in an action for its recovery, the measure of damages is limited to the proceeds of the execution sale, less the expenses thereof. *Dowdell v. Carpy*, 137 Cal. 333 (70 Pac. Rep. 167). As supporting this rule the court cite: *Peck v. McLean*, 36 Minn. 228 (30 N. W. Rep. 759; 1 Am. St. Rep. 665); *Gay v. Smith*, 38 N. H. 171. A purchaser of property at an assignee's sale, made after the death of the assignor, under an order authorizing only a sale of such title as the assignee had, and whose deed under such sale conveyed only such title, can not deduct from his bid the value of the dower interest of the assignor's widow who had not joined in the deed of assignment, although she gave notice of her claim of dower at the sale to which the attorney for the assignee responded by announcing "that bidders would pay no attention to the dower notice, as the purchaser would receive a good title, and free of all liens and incumbrances whatsoever"; and creditors present remained silent. The statement by the attorney was held to be merely an opinion. *Snyder v. McLanahan*, 203 Pa. St. 55 (52 Atl. Rep. 7). Where a purchaser at a judicial sale, by the terms of which he was required to give notes for the purchase money with good and sufficient sureties, complies with the conditions of the sale by giving the required notes, but with insufficient sureties, he is entitled to notice of a resale; but when he purposely offers notes with insolvent sureties, he stands on the footing of a purchaser who has made no effort to comply with the terms of the sale, and is not entitled to notice of the court's action in setting aside the sale and ordering a resale. *Oakley v. Howison*, 131 Ala. 505 (32 So. Rep. 644). Va. Laws 1883-84, p. 213 construed and applied—relief of purchaser from liability for purchase money paid to special commissioner who has given bond. *Pulliam v. Tompkins*, 99 Va. 602 (39 S. E. Rep. 221).

Sec. 361. Title and rights of purchaser—Writ of assistance. Townsend's S. C. Code, § 2733, authorizes a judge of a circuit court to issue a writ of assistance, to enable the sheriff to put the purchaser at judicial sale in possession, at chambers. The applicant for such a writ is not re-

quired to make proof of formal production of his deed when it appears that the party in possession, with knowledge of the sale, withholds possession from the purchaser on the ground that the sale is void. *Murchison v. Miller*, 64 S. C. 425 (42 S. E. Rep. 177). An alias writ will not be issued on an application made several years after the issuance of the first writ which was returned on the day of its issue as having been executed "by putting * * * into the possession" a person designated as the agent of the purchaser applying for the alias writ. *Ex parte Forman*, 130 Ala. 278 (30 So. Rep. 480). In the case of *Merrill v. Wright*, Neb. (91 N. W. Rep. 697), the supreme court of Nebraska, in discussing against whom the writ may be issued, say: "That writ may issue only against parties to a suit, or persons in privity with them, who have been concluded by a decree, and yet refuse to permit the purchaser at judicial sale under such a decree to take possession. *Terrell v. Allison*, 21 Wall. 291 (22 L. Ed. 634); *Howard v. Bond*, 42 Mich. 131 (3 N. W. Rep. 289). Questions of title are not to be tried on an application for the writ, as against persons in possession, claiming adversely to the parties, and not bound by the decree. *Barton v. Beatty*, 28 N. J. Eq. 412; *Exum v. Baker*, 115 N. C. 242 (20 S. E. Rep. 448; 44 Am. St. Rep. 449). It is error to award it against a person who had entered upon land pendente lite, claiming an independent title, not derived from or in succession to any of the parties to the suit or their privies. *Exum v. Baker*, 115 N. C. 242 (20 S. E. Rep. 448; 44 Am. St. Rep. 449); *Ricketts v. Association*, 67 Ill. App. 71; *Hagerman v. Heltzel*, 21 Wash. 444 (58 Pac. Rep. 580); *Toll v. Hiller*, 11 Paige, 228; *Van Hook v. Throckmorton*, 8 Paige, 33."

Sec. 362. Setting aside—Irregularities—Inadequacy of price. A court properly may disapprove a guardian's sale at the instance of a prospective purchaser at a resale who offers to purchase the property at an increased bid, and in support of his offer, deposits an amount in excess thereof. *McCallum v. Chicago Title & Trust Co.*, 203 Ill. 142 (67 N. E. Rep. 823). The title of a purchaser is not affected by the fact that a sale is made by a referee instead of the sheriff, as required by statute (N. Y. Laws 1889, ch. 167), by reason of a decree to that effect by the court; and the statute referred to is constitutional. *Sproule v. Davies*, 171 N. Y. 277 (63

N. E. Rep. 1106). The fact that the brother of one of the appraisers bid at a judicial sale will not invalidate it. *Mastin v. Sweigart*, (Ky.) 72 S. W. Rep. 750 (24 Ky. Law Rep. 1920). An execution sale will be set aside on the ground of chilling the bidding, where an attorney made the announcement that he hoped nobody would bid against his client who had bid the amount of the judgment and bought in the land for the children of the deceased execution defendant. *Toole v. Johnson*, 61 S. C. 34 (39 S. E. Rep. 254). Gross inadequacy of price obtained for property at a sheriff's sale, which has been in all respects regular, will not be sufficient to avoid the sale, unless the person who has suffered thereby has been at the time of the sale under some kind of legal or other restraint which has prevented him from attending it, or unless circumstances of a fraudulent character be shown. *McLain Land & Inv. Co. v. Swofford Bros. Dry Goods Co.*, 11 Okla. 429 (68 Pac. Rep. 502). Where property is purchased by a stranger, the sale will not be set aside for mere inadequacy of price, no matter how gross, unless there is some unfair practice at the sale, or unless there is surprise, without fault on the part of those interested. *Helena Coal Co. v. Sibley*, 132 Ala. 651 (32 So. Rep. 718). For particular fact cases illustrating what inadequacy of price and attendant irregularities will justify setting aside a judicial sale, see *Ryan v. Wilson*, N. J. (52 Atl. Rep. 993); *Quick v. Collins*, 197 Ill. 391 (64 N. E. Rep. 288); *Smith v. Georgia Loan & Trust Co.*, 114 Ga. 189 (39 S. E. Rep. 846); *Schmertz v. Hammond*, 51 W. Va. 408 (41 S. E. Rep. 184).

LANDLORD AND TENANT.

EPITOME OF CASES.

Sec. 363. As to when the relation exists. One who, without consideration, merely agrees to place another in possession of property is in no legal sense a lessor; nor can he be held liable as such, if through no fault of his own, the person to whom he yields possession of the property is after-

wards deprived of the use and enjoyment thereof. *Southern Cotton Seed Oil Co. v. Edwards*, 113 Ga. 1031 (39 S. E. Rep. 463). Occupancy by one employed by the owner of lands as superintendent thereof, of a house thereon, does not create the relation of landlord and tenant, where such occupancy was a part merely of the contract for service, and operated as a portion of the consideration of that agreement. *Davis v. Williams*, 130 Ala. 530 (30 So. Rep. 488; 54 L. R. A. 749; 89 Am. St. Rep. 55).

Sec. 364. Estoppel to deny title. As a general rule, while a tenant occupies the premises of his landlord he is estopped to deny his landlord's title. *Davis v. Williams*, 130 Ala. 530 (30 So. Rep. 488; 54 L. R. A. 749; 89 Am. St. Rep. 55; see pp. 62-115 for exhaustive collation of authorities on "Estoppel of tenant to deny his landlord's title"). One entering and taking possession under the tenant of another becomes the tenant of the original lessor and is estopped to deny his title. *Stewart v. Keener*, 131 N. C. 486 (42 S. E. Rep. 935). A vendee of lands, who, after the execution of his contract of purchase, takes a lease of his lands from his vendor, thereby becomes a tenant of the vendor, is estopped to deny his title, and can not afterwards sue for specific performance of his contract of purchase. *Davis v. Williams*, 130 Ala. 530 (30 So. Rep. 488; 54 L. R. A. 749; 89 Am. St. Rep. 55). The tenant may not set up title in himself, or an outstanding title, to defeat a recovery of the possession of the land by the landlord, unless he can show that he has acquired the landlord's title since the creation of the tenancy, or that the title of the landlord has expired. *Hammond v. Blue*, 132 Ala. 337 (31 So. Rep. 357).

Sec. 365. Forfeiture of tenant's estate. A custom for the tenant to seek the landlord to pay the rent will not relieve the latter from the necessity of formal and legal demand if he seeks to make nonpayment the basis of a forfeiture, where there is no place of payment specified in the lease. *Rea v. Eagle Transfer Co.*, 201 Pa. St. 273 (50 Atl. Rep. 764; 88 Am. Rep. 809). A lessee can not claim relief from forfeiture for nonpayment of rent by showing a refused tender of the balance due to the lessor after deducting from the amount of the rent a disputed claim asserted by the lessee against the lessor.

Pershing v. Feinberg, 203 Pa. St. 144 (52 Atl. Rep. 22). In construing a statute (Me. Rev. Stat., ch. 17, §§ 1, 3) providing that a tenant using leased premises for the sale of intoxicating liquors "forfeits his right thereto and the owner may make immediate entry, without process of law," or have his action of forcible entry and detainer, it is held that a forfeiture on account of the statute becomes effective only upon the owner's enforcing the same; and his right to enforce such a forfeiture for acts done does not pass to his subsequent grantee. *Small v. Clark*, 97 Me. 304 (54 Atl. Rep. 758).

Sec. 366. Tenancy at sufferance. Under R. I. Gen. Laws, ch. 269, § 6, providing that "the time agreed upon in a definite letting shall be the termination thereof for all purposes; and if there be no time of termination agreed upon, it shall be deemed a letting from year to year," it is held that a tenant for one year holding over after the expiration of his term becomes a tenant at sufferance. *Wood v. Page*, 24 R. I. 594 (54 Atl. Rep. 372). A tenant at sufferance made such by a conveyance of which he has no notice or knowledge is not liable to an action for rent, under the provisions of Mass. Pub. Stat., ch. 121, §§ 3, 6, 8. *Dixon v. Smith*, 181 Mass. 218 (63 N. E. Rep. 419).

Sec. 367. Holding over. Where premises have been rented for a period of one month at a monthly rental, and the tenant holds over with the consent of the landlord, a monthly tenancy is established. *Baker v. Kenney*, N. J. L. (54 Atl. Rep. 526). Holding over after the expiration of any month renders a tenant from month to month liable for the rent of the ensuing month, whether the tenancy was created by express agreement or by the mere acceptance for a long period of time of monthly rentals. Keeping the keys for five days after the expiration of the monthly period, and remaining in possession of the leased property for the purpose of cleaning up the rubbish after the refusal of the landlord to accept the keys at the expiration of the month, render the tenant liable for another month's rent. *Byxbee v. Blake*, 74 Conn. 607 (51 Atl. Rep. 535; 57 L. R. A. 222). Where a landlord advised his tenant by letter that if he held over after the term the rent would be a certain specified sum per month, the holding over by the tenant, without answering the letter

or agreeing to its terms does not create a new contract at the rental named. *Lautmann v. Miller*, 158 Ind. 382 (63 N. E. Rep. 761). A tenant under a lease for a definite period, who, after the expiration of his lease, continues to hold possession of the premises by the express or implied consent of the owner, becomes a tenant from year to year, and the rights of the parties during the tenancy from year to year are controlled by the terms and conditions of the original lease. *Ridgeway v. Hannum*, 29 Ind. App. 124 (64 N. E. Rep. 44). When a tenant, at the expiration of a written lease, holds over as a tenant from year to year, upon the terms of the original lease, and the landlord notifies the tenant, before the beginning of another year, that if the latter holds over into another year the rent will be increased, and the tenant does so hold over, the terms and conditions of the original lease will be modified in respect to the rent so as to conform to such notice, but in all other respects they will continue to be applicable to the new tenancy. *Armstrong v. Kattenhorn*, 11 Ohio, 265, distinguished. *Moore v. Harter*, 67 O. St. 250 (65 N. E. Rep. 883). Citing, *Wood, Landl. & Ten.* § 13; *Roberts v. Hayward*, 3 Car. & P. 432; *Digby v. Atkinson*, 4 Camp. 275; *Hunt v. Bailey*, 39 Mo. 257; *Brinkley v. Walcott*, 10 Heisk. 22; *Despard v. Walbridge*, 15 N. Y. 374; *Gardner v. Board*, 21 Minn. 33; *Amsden v. Blaisdell*, 60 Vt. 386 (15 Atl. Rep. 332); *Reithman v. Brandenburg*, 7 Colo. 480 (4 Pac. Rep. 788); *Higgins v. Halligan*, 46 Ill. 173; *Griffin v. Knisely*, 75 Ill. 411; *Hoff v. Baum*, 21 Cal. 120.

Sec. 368. Termination of relation—Notice to quit.

Although a lease authorizes an ouster for the nonpayment of water rent the lessor can not enter and terminate such lease as to one tenant where there are several tenants using water measured by only one meter and no attempt has been made by him to apportion the water rents among the tenants. *Hartford v. Taylor*, 181 Mass. 266 (63 N. E. Rep. 902). A lease is not terminated by the lessee selling a building placed on the leased premises by him and which, under the terms of the lease, was removable at his pleasure. *Ricard v. Dana*, 74 Vt. 74 (52 Atl. Rep. 113). The terms of a tenancy for an indefinite time with monthly rent reserved are not changed so as to affect the method for its termination by the fact that the lessor accepted the rent quarterly in advance merely for the convenience of the tenant. *London & San Francisco Bank v. Curtis*, 27 Wash.

656 (68 Pac. Rep. 329). In a tenancy by the month, the notice must be to quit on one of the recurring periods of the holding, and, if the notice be served on a day of the corresponding date in the preceeding month, it will be sufficient. *Baker v. Kenney*,

N. J. L. (54 Atl. Rep. 526). The right of a landlord under the statute of Delaware to have three months written notice before the end of the term from his tenant of his intention to move, in certain cases, is not waived, so as to relieve the tenant from liability for rent, by the landlord's oral request that such notice should be given by the tenant at a shorter time, and the giving of such notice. *Lewis v. Scanlan*, 3 Penn. (Del.) 238 (50 Atl. Rep. 58). One entering without authority, who afterwards pays a month's rent, which is accepted, thereby becomes a tenant at will so as to be entitled to the notice required by Minn. Gen. Stat. 1894, § 5873. *Van Brunt v. Wallace*, 88 Minn. 116 (92 N. W. Rep. 521). A landlord may waive his right to the statutory notice for the termination of a tenancy from year to year, required by Wis. Rev. Stat. 1898, § 2187. *Eimermann v. Nathan*, 116 Wis. 124 (92 N. W. Rep. 550). See opinion for particular facts held to constitute such a waiver.

Sec. 369. Time allowed tenant to remove his personal property after expiration of lease—Effect of failure to remove. A tenant has a reasonable time after the expiration of his term in which to remove his personal property, and he does not forfeit his right to it by failure to remove the same within a reasonable time. *Smith v. Boyle*, Neb. (92 N. W. Rep. 1018). The court say: "If the outgoing tenant does not remove his goods within a reasonable time, the law is well settled that the landlord or any subsequent lessee can remove such property, if he exercises such care in so doing as the nature of the property demands, and if he leaves it in such condition that the owner by reasonable diligence can take it uninjured; and in such case he is not bound to protect it until the owner sees fit to take it away. *Manufacturing Co. v. Stevens*, 52 Mich. 330 (17 N. W. Rep. 934); *Low v. Elwell*, 121 Mass. 309 (23 Am. Rep. 272). * * * The theory of the plaintiff in error, that a tenant forfeits his property to the landlord by neglecting to remove it within a reasonable time after the expiration of his lease, is wholly untenable, and finds no support in the authorities. It is fixtures only which the tenant forfeits or abandons by neglecting to remove them dur-

ing the term of his lease, or while still in possession of the premises."

Sec. 370. Surrender. Where the lessor tells the lessee to quit the premises, and the lessee does quit, and the lessor takes possession himself, or accepts rent from another, such change of possession by mutual agreement operates as a surrender of the lease. *Boyd v. George*, (Neb.) 89 N. W. Rep. 271. The leaving of the key of premises by a tenant from month to month at the office of the landlord in his absence is not such surrender and acceptance of the premises as to discharge the tenant's liability for rent. *Durfee v. United Stores*, 24 R. I. 254 (52 Atl. Rep. 1087). A landlord who for himself re-enters and takes possession of leased premises after their abandonment by his tenant, without indicating any purpose on his part to hold the tenant liable for the rent or to lease the premises to others on account of the tenant, thereby accepts the abandonment as a surrender of the lease. *Armour Packing Co. v. Des Moines Pork Co.* 116 Ia. 723 (89 N. W. Rep. 196; 93 Am. St. Rep. 270); *Hayes v. Goldman*, Ark. (72 S. W. Rep. 563). Taking possession of premises by a landlord, advertising the same for rent, making repairs thereon and actually reletting the same, all without consulting his previous tenant who has removed before the expiration of his lease, after notice to the landlord, constitutes an acceptance of the tenant's surrender of the premises. *White v. Berry*, 24 R. I. 74 (52 Atl. Rep. 682). The fact that the lessor enters and relets property abandoned by his lessee before the expiration of his term and of which he has made a proffered surrender that has been refused by the lessor, does not constitute an acceptance so as to relieve the lessee from the payment of rent under the covenants of the lease, where the lessor gave notice to the lessee that the property would be rented subject to the covenants of the lease, and, if a tenant could be secured, and rent collected, the lessee would be credited therewith, and be liable for the difference. *Oldewurtel v. Wiesenfield*, 97 Md. 165 (54 Atl. Rep. 969). For particular fact cases illustrating what constitutes a surrender, see *Paget v. Electrical Engineering Co.*, 85 Minn. 311, (88 N. W. Rep. 844). *Fish v. Thompson*, 129 Mich. 313 (88 N. W. Rep. 896).

Sec. 371. Surrender by operation of law. When the minds of the parties to a lease concur in the common intent

of relinquishing the relation of landlord and tenant, and execute this intent by acts which are tantamount to a stipulation to put an end thereto, there at once arises a surrender by act and operation of law. The terms of such a surrender may be settled by parol, and, after execution, are enforceable. *Dennis v. Miller*, N. J. (53 Atl. Rep. 394). Where a lessor of a building, upon its afterward being used by a corporation formed by the lessee and others, refused to accept the corporation as tenant, but leased the building to the corporation at the same rental until he could secure another tenant, there is a surrender of the original lease by operation of law. *Drew v. Billings-Drew Co.*, Mich. (92 N. W. Rep. 774). A re-entry and reletting of premises by a landlord upon their vacation by his tenant is not a surrender by operation of law, where the lease provided that, if the premises became vacant or deserted during the term, the landlord should be authorized to re-enter and relet the premises, and apply the rent first to the payment of the expenses of re-entering and reletting, and then to the payment of the rent due "by these presents;" and the tenant may recover the balance over and above the rightful deductions of rent received from the reletting. *Jones v. Rushmore*, 67 N. J. L. 157 (50 Atl. Rep. 587).

In discussing what constitutes a surrender by operation of law, the supreme court of Arkansas, in the case of, *Hayes v. Goldman*, Ark. (72 S. W. Rep. 563), say: "Any acts which are equivalent to an agreement on the part of a tenant to abandon, and on the part of the landlord to assume possession of, the desmised premises on his own account, amount to a surrender of the term by operation of law. 1 Washburn on Real Property (6th Ed.) § 739; *Williamson v. Crossett*, 62 Ark. 393 (36 S. W. Rep. 27); *Kneeland v. Schmidt*, 78 Wis. 345 (47 N. W. Rep. 438; 11 L. R. A. 498); *Talbot v. Whipple*, 14 Allen 180; 18 Am. & Eng. Enc. Law (2d Ed.) 364. An express agreement to accept the surrender need not be shown, for the landlord's assent may be implied by operation of law from the manner in which he uses the property after its abandonment by the tenant. 2 Wood on Landlord & Tenant (2d Ed.) 1173. If the landlord takes charge of the property after the tenant has abandoned it, merely to protect it from injury, or if, knowing that the tenant does not intend to return, he rents it to the account of the tenant, these acts may not show assent on his part; but if, after an abandonment, he takes possession, and rents the

premises on his own account, this is conclusive evidence of a surrender. *Williamson v. Crossett*, 62 Ark. 393 (36 S. W. Rep. 27); *Underhill v. Collins*, 132 N. Y. 269 (30 N. E. Rep. 576); and other cases cited above."

Sec. 372. Farming on the shares—Title to crops. The relation of landlord and tenant is not created between the parties, within the meaning of the New Jersey Landlord and Tenant Act, by a contract with the owner of farm lands to cultivate the same for a certain period for a specified share of the crop, although the contractor is entitled to the use of the buildings. *State v. Reynolds*, 67 N. J. L. 169 (50 Atl. Rep. 670). A lease of farm lands using the technical words "lease, demise and let," which places the premises, with certain exceptions, in the exclusive possession of the lessee for a definite term, with power to raise such crops as he pleases, he to pay the lessor one-half of the income received by him from the sale of the crops and products, creates the relation of landlord and tenant and places the title to the crops in the tenant with right of disposition. *Rowlands v. Voechting*, 115 Wis. 352 (91 N. W. Rep. 990). The fact that the rental reserved in a lease of farm land was to consist of a certain proportion of the grain which should be raised on the land, to be delivered, after harvesting, in sacks, at a named place of delivery, does not make the landlord the owner of a share of the crop, so as to prevent the lessee's recovery of damage caused to the entire crop on account of breach of a contract made by him with a third party to harvest the crop. *Holt Mfg. Co. v. Thornton*, 136 Cal. 232 (68 Pac. Rep. 708). Where, by the terms of a contract, under which one who has agreed to till the land of another, he acquires title to one-half the crops, he may sue the land owner for a conversion of his interest in the crop, where such owner sells all the crop and refuses to divide the proceeds. *Northness v. Hillestad*, 87 Minn. 304 (91 N. W. Rep. 1112).

Sec. 373. Landlord's lien. Where personal property is placed on leased premises under a contract of sale to the lessee, by the terms of which the sale is not completed so as to pass any title to him until certain conditions have been met, and at that time he gives a chattel mortgage on the property for the purchase price, such mortgage is superior to the landlord's lien for future accruing rents. *Davis Gaso-*

line Engine Works v. McHugh, 115 Ia. 415 (88 N. W. Rep. 948). Under Kan. Gen. Stat. 1901, § 26, one purchasing crops with notice of the landlord's lien thereon for rent is liable for the value of the crops purchased, to the extent of the rent due, and damages; and this liability may arise from constructive notice of the lien. Stadel v. Aikins, 65 Kan. 82 (68 Pac. Rep. 1088). A landlord without a legal remedy for the protection of his lien, on account of his rent not being due, may have an injunction against his tenant's removal of goods from the premises evidently made for the purpose of impairing such lien, notwithstanding the tenant is solvent. Wallin v. Murphy, 117 Ia. 640 (91 N. W. Rep. 930). In South Carolina it is held that a mule or a horse can not be included in a landlord's agricultural lien, under the term "advances or supplies with which to make a crop." Hankinson v. Hankinson, 61 S. C. 193 (39 S. E. Rep. 385). Ala. Code, § 2705 construed and applied—landlord's lien on crops—rights of bona fide purchaser. Bush v. Hills, 130 Ala. 395 (30 So. Rep. 443). Sand. & H. Ark. Dig., § 4795 construed and applied—lien for crop advances. Neal v. Brandon, 70 Ark. 79 (66 S. W. Rep. 200).

Sec. 374. Landlord's lien—Forfeiture and waiver of lien. A landlord can not assert a lien for other indebtedness than that arising from the renting of the premises for the time covered by the lease, and, if he attempts to do so in such way as to render it impracticable to determine what amount is due for the lease of the premises, he forfeits his entire lien. First Nat. Bank v. Flynn, 117 Ia. 493 (91 N. W. Rep. 784). A landlord's lien upon his tenant's property is waived when his agent stands by and acquiesces in a sale of the property made by the tenant in reliance upon such acquiescence. Fishbaugh v. Spunaugle, 118 Ia. 337 (92 N. W. Rep. 58). An agreement by a landlord waiving the priority of his lien over a mortgage given by his tenant to secure a crop advance, which does not authorize its assignment, does not inure to the benefit of a subsequent assignee of the mortgage taking with notice of the personal nature of the agreement. Neeley v. Phillips, 70 Ark. 90 (66 S. W. Rep. 349).

Sec. 375. Repairs. In the absence of an express contract, there is no liability upon a landlord to make repairs, or to put a tenement in proper condition for occupancy. Italy

v. Demmon, 181 Mass. 543 (63 N. E. Rep. 943); Kearines v. Cullen, 183 Mass. 298 (67 N. E. Rep. 243). There is no common-law obligation on a landlord to restore a roof destroyed by natural wear and tear, nor is such an obligation imposed by Ky. Stat., § 2297. *Thomas v. Conrad*, Ky. (71 S. W. Rep. 903; 24 Ky. Law Rep. 1630). A parol promise by a landlord to make repairs not inserted in a subsequent written lease to the tenant is of no avail; and his promise during the term to make repairs is without consideration. *Aldag v. Ott*, 28 Ind. App. 542 (63 N. E. Rep. 480). Where a lessor lets a building for a particular purpose, and covenants to repair it, it is his duty to put it in such a state of repair as the business requires; and it is not important whether or not the defects existed at the date of the lease, or arise from defects in construction or from general dilapidation. *Piper v. Fletcher*, 115 Ia. 263 (88 N. W. Rep. 380). Construing and applying N. Dak. Codes, §§ 4080, 4081, providing that "the lessor of a building intended for the occupation of human beings must in the absence of an agreement to the contrary put it into a condition fit for such occupation and repair all subsequent dilapidations thereof, except that the lessee must repair all deteriorations or injuries thereto occasioned by his ordinary negligence," and giving the lessee the right to make such repairs and deduct the expense thereof from the rents, upon the lessor's failure to make the same after notice, it is held that the putting in of a sewer connection with the cellar of a dwelling house does not come within the meaning of the word "repairs," "dilapidation," or "deterioration," but pertains more to an addition or improvement of an original character. *Torreson v. Walla*, 11 N. Dak. 481 (92 N. W. Rep. 834).

Sec. 376. Repairs—Rights of lessee upon breach of lessor's covenant to make. In discussing the rights of a lessee on breach of his lessor's covenant to make repairs, the supreme court of Iowa, in the case of *Piper v. Fletcher*, 115 Ia. 263 (88 N. W. Rep. 380), say: "That the tenant may recover damages for breach of covenant to repair is well settled. He may also make the repairs himself, and charge the cost of the same to the landlord, or he may recoup his damages in an action by the landlord for rent. The covenant to pay rent and the covenant to repair are independent, however; and failure of the landlord to repair does not work a

forfeiture of the rent, where the tenant remains in the possession and occupancy of the premises. *Young v. Burhans*, 80 Wis. 438 (50 N. W. Rep. 343). But if the landlord fails to repair, and in consequence the premises become untenable, the tenant may abandon them and escape liability for rent. *Bissell v. Lloyd*, 100 Ill. 214; *Boswick v. Losey*, 67 Mich. 554 (35 N. W. Rep. 246); *Lewis v. Chisholm*, 68 Ga. 40. To warrant an abandonment, however, it must be shown that the premises became untenable by reason of the landlord's failure to comply with his agreement. *Prescott v. Otterstatter*, 85 Pa. 534; *Blake v. Dick*, 15 Mont. 236 (38 Pac. Rep. 1072; 48 Am. St. Rep. 671); *Moore v. Gardiner*, 161 Pa. 175 (28 Atl. Rep. 1018)."

Sec. 377. Nature of obligation of owner of building leasing separate portions to different tenants to keep roof and other parts used in common in repair—Breach of obligation a tort. The obligation resting upon the owner of a building leasing separate portions thereof to different tenants, to keep in a safe condition the roof and others parts used in common by his tenants, and over which he reserves control, is not an implied contractual obligation, so that damages resulting to property of a lessee from breach of it can be set up as a counterclaim in an action for rent; but it is a duty the violation of which constitutes a tort and is actionable as such. *Kuhl v. Sol. Heavenrich Co.*, 115 Wis. 447 (91 N. W. Rep. 994; 60 L. R. A. 585). The court say: "*Toole v. Beckett*, 67 Me. 544 (24 Am. Rep. 54), is confidently referred to by appellant's counsel. It is sufficient for this case to say of that one that the action was not to recover on contract, but for a tortious act. True, the nature of the wrong complained of was failure to repair a roof under very much the same circumstances as those we have before us; and if this were an action for damages for negligent inattention to the roof, *Toole v. Beckett*, 67 Me. 544 (24 Am. Rep. 54), would be in point for what it is worth, though it has been pronounced unsound by most courts that have considered it. Certainly, none of the authorities cited by the learned court in support of its decision involved an implied contract as between landlord and tenant or any other obligation specially applicable to that relation. To illustrate: *Kirby v. Association*, 14 Gray, 249 (74 Am. Dec. 682), was an action for personal injuries caused by a sidewalk being unsafe for travel

by reason of an accumulation of snow and ice thereon. It was claimed that such unsafe condition was produced by the improper discharge of water upon the walk from the defendant's building, the rooms in which were occupied by numerous tenants, each having a specific part thereof, the defendant retaining charge of the passage ways and roof and general care of all parts of the building necessary for the common use of the tenants. The court held that if the defendant's structure produced the nuisance which caused the injury he was liable. It will be easily seen that the principle involved is familiar and has nothing to do with the contractual duties of the owner of a building to his tenants. *Priest v. Nichols*, 116 Mass. 401, was an action sounding in tort. It did not involve any question whatever as to the duty of a landlord specially to his tenant to repair. The wrong complained of would have been actionable had it been committed to another tenant in the building or by a stranger. The landlord used a part of the structure as an engine room. He operated the engine in such a negligent manner as to permit water from the waste pipe thereof to escape and reach the plaintiff's property. In *Gray v. Gaslight Co.*, 114 Mass. 149 (19 Am. Rep. 324), the controversy was between the landlord and a stranger, the latter being a sufferer from the negligence of the former in permitting a chimney to fall from his building. In *Norcross v. Thoms*, 51 Me. 503 (81 Am. Dec. 588), defendant was held guilty of maintaining a nuisance to the injury of the plaintiff in that he so conducted a blacksmith shop as to cause dust and ashes to pass therefrom to the plaintiff's property to its injury. The relation of landlord and tenant was not involved directly or indirectly.

Where there is any support in the cases above referred to for the decision in *Toole v. Beckett*, 67 Me. 544 (24 Am. Rep. 54), we are unable to understand. Many courts have expressed the same views. *Jones v. Millsaps*, 71 Miss. 10 (14 So. Rep. 440; 23 L. R. A. 155); *Krueger v. Ferrant*, 29 Minn. 385 (13 N. W. Rep. 158; 43 Am. Rep. 223); *Ward v. Fagin*, 101 Mo. 669 (14 S. W. Rep. 738; 10 L. R. A. 147; 20 Am. St. Rep. 650); *Purcell v. English*, 86 Ind. 34 (44 Am. Rep. 255). In *Looney v. McLean*, 129 Mass. 33 (37 Am. Rep. 295), like the other cases upon which counsel relies, the landlord was held liable to his tenant for negligence upon the same principle that he would have been to a stranger

for inducing a tenant to use a portion of the building which he undertook to keep in order, knowing that it was unsafe.

Argument seems unnecessary to show that if we were to concede that *Toole v. Beckett*, 67 Me. 544 (24 Am. Rep. 54), and *Looney v. McLean*, 129 Mass. 33 (37 Am. Rep. 295), were correctly decided, they are not authority for a recovery by a tenant upon an implied contract to repair. In *Tuttle v. Manufacturing Co.*, 145 Mass. 169 (13 N. E. Rep. 465), *Looney v. McLean*, 129 Mass. 33 (37 Am. Rep. 295), was considered, it being particularly pointed out that it went on negligence, not on contract. Text-writers generally do not recognize the exception for which counsel contends. *Chapl. Landl. & Ten.* § 247; 1 *McAdam, Landl. & Ten.* 436; *Hall, Mass. Landl. & Ten.* § 25; *Taylor, Landl. & Ten.* p. 376, note 2. In *Woodf. Landl. & Ten.* 173, 174, note, a misconception of principles and authorities is observable. The writer says there is no implied covenant on the part of a landlord to repair where the whole building is leased, while there is such a covenant where the building is leased to several tenants. Many cases are cited which turned on the general common law rule under discussion, and others on liability for negligence, the writer failing to discover the distinction between the two classes. That confusion easily led to the error of supposing that the rule holding the landlord liable for negligence is necessarily an exception to the common law exemption of the landlord from any liability by implied covenant or contract. No better illustration of the writer's confusion can be given than to call attention to the fact that *Krueger v. Ferrant*, 29 Minn. 385 (13 N. W. Rep. 158; 43 Am. Rep. 223); *Purcell v. English*, 86 Ind. 34 (44 Am. Rep. 255); *Doupe v. Genin*, 45 N. Y. 119 (6 Am. Rep. 47), and other cases expressly holding that there is no exception to the common law rule as to liability upon implied contract, are cited in close connection with *Scott v. Simons*, 54 N. H. 426; *Cole v. McKey*, 66 Wis. 500 (29 N. W. Rep. 279; 57 Am. Rep. 293), and other cases where a recovery was sought for actionable negligence.

The only case of consequence that we are aware of, where an action to recover damages upon an implied contract to repair in circumstances similar to those here was sustained is *Bissell v. Lloyd*, 100 Ill. 214. No authority is cited to support the decision. As said of it in *Jones v. Millsaps*, 71 Miss. 10 (14 So. Rep. 440; 23 L. R. A. 155), 'it is the naked asser-

tion of the court of last resort,' that is all. Even as such it would of course be entitled to respect if the question treated was doubtful and the indications were that the court fully grasped the principles involved. The indications in the Illinois case are to the contrary. It is quite plain that the court confused liability resting purely on negligence and liability resting in contract. If there was doubt about that it would be solved by the later case of *Payne v. Irvin*, 144 Ill. 482 (33 N. E. Rep. 756), an action sounding in tort, where the former case, and the leading cases to which we have referred, grounded on negligence were cited in support of the result reached."

LEASES.

EPITOME OF CASES.

Sec. 378. What constitutes a lease—Parol lease. A lessee is bound by a lease signed only by the lessor, where he accepts it and holds thereunder claiming the right to exercise the privileges granted by the lease. *Doxey's Estate v. Service*, 30 Ind. App. 174 (65 N. E. Rep. 757). A lease executed in the name of a partnership by one member thereof, without authority, may become binding by the firm's subsequent ratification thereof. *Golding v. Brennan*, 183 Mass. 286 (67 N. E. Rep. 239).

Part performance may take a parol lease out of the statute of frauds. *Deeds v. Stephens, Ida.* (69 Pac. Rep. 534). A tenant entering into possession of premises under an agreement to execute a written lease therefor for a period of one year, thereby creates a tenancy by parol in accordance with the terms of the written lease, though his not signing the same resulted from a breach of the lessor's agreement as to repairs. *Bonaparte v. Thayer*, 95 Md. 548 (52 Atl. Rep. 496). In Minnesota it is held that an oral agreement made for a lease of real property for a year, to take effect in the future, is void. *Cram v. Thompson*, 87 Minn. 172 (91 N. W. Rep. 483). The same is held in Missouri. *Butts v. Fox*, 96 Mo. App. 437 (70 S. W. Rep. 515). Construing Shannon's

Tenn. Code, § 3142, subd. 4, providing that no action can be maintained upon a lease of land for a longer term than one year unless it be in writing, and subd. 5, containing the same prohibition as to any contract not to be performed within the space of one year "from the making thereof," it is held that subd. 4 governs leases and that a parol lease for one year to commence in the future is valid. *Hayes v. Arrington*, 108 Tenn. 494 (68 S. W. Rep. 44). The rule that a lease to be performed within one year is not within the statute of frauds has not been changed by Bal. Ann. Wash. Codes & Stat., § 4568. *Ward v. Hinckley*, 26 Wash. 539 (67 Pac. Rep. 220).

Sec. 379. Construction of leases. A stipulation in a lease that it shall be null and void on failure of the lessee to pay rent or keep other covenants is not self-operating so as to make the lease void ipso facto by the default, but, being a provision for the benefit of the lessor, may be enforced or waived at his option. *English v. Yates*, 205 Pa. St. 106 (54 Atl. Rep. 503). In construing a particular lease it is held that a stipulation that, if the taxes are paid by the lessee, they "shall be deducted from the rent herein covenanted to be paid by said lessee," and the lessee covenants to pay the rent semiannually, plainly imports that, as fast as the taxes are paid, they should be deducted from the installment of rent falling due next after such payment, and if not deducted then, they could not be taken out at all. *Lewiston & A. R. Co. v. Grand Trunk Ry. Co.*, 97 Me. 261 (54 Atl. Rep. 750). For construction of particular leases, as to lessor's remedy against defaulting lessee, *McCready v. Lindenborn*, 172 N. Y. 400 (65 N. E. Rep. 208); as to when rent is due, *Hubenka v. Vach*, 64 Neb. 170 (89 N. W. Rep. 789); liability of lessee for destruction of property by fire, *Porter v. Allen*, Ida. (69 Pac. Rep. 105); repairs, *Simkins v. Cordele Compress Co.*, 113 Ga. 1050 (39 S. E. Rep. 407).

Sec. 380. Construction of leases—Stipulation in lease of lot by camp meeting association requiring lessee to conform to its rules and regulations. A stipulation in a lease by a camp meeting association of a lot in a park maintained by it for camp meeting purposes, that the lessee should keep and perform all such conditions or rules and regulations as the lessor should from time to time impose, extends to such future regulations only as are reasonable, and a subsequent

regulation forbidding tenants from purchasing supplies except at stores operated by the association are unreasonable and void. *Thousand Island Park Ass'n v. Tucker*, 173 N. Y. 203 (65 N. E. Rep. 975; 60 L. R. A. 786). The court say: "In determining whether the by-law of a corporation is reasonable or not, there should properly be considered the nature of the corporation, and the object for which it is organized. In the present case it was intended to maintain plaintiff's park as a camp meeting ground. Its purpose was not only to provide a place for recreation, but also for the spiritual and religious edification of its members. It is well known that some religious denominations entertain views as to the propriety and conduct and demeanor of members, their recreations and their modes of life, that seem strict and possibly intolerant to the rest of the community. When a person joins such an association, he must expect to conform to its standards. So here, any one leasing grounds from the plaintiff, with the reservation in his lease of the right of the plaintiff to establish new regulations, might naturally expect the possibility of new regulations regarding the enjoyment of his property so as to prevent giving scandal or offense to the other tenants. Regulations of this nature, which would be condemned as unwarrantable invasions of private liberty in the case of ordinary companies organized for the improvement, development, and sale of tracts of land, would, in the case of an association like the plaintiff, be properly upheld. The regulation which the plaintiff has sought to import into its leases is not of this character, but solely for the purpose of pecuniary gain. No regulation of the kind, nor on the subject, existed at the time the grounds were leased; and there was no reason why a person renting the lands should expect such a regulation to be enacted by the plaintiff, any more than if he had rented the premises from an ordinary land company. The regulation seems to me of an arbitrary and most unreasonable character. Not only are the cottagers entitled to purchase where they can buy the cheapest, but in articles of food there is great difference of individual taste. In the grocery shop established by the plaintiff there are certain brands of flour or coffee, and it may be that, if the question is to be decided by the courts, those brands would be held to be the best. Nevertheless, some of the cottagers might like other brands better. Some might prefer their vegetables fresh from the defendant's farm, to those that have stood on the huckster's stand in the market. The articles kept

in the plaintiff's stores and shops may be good, and the prices charged therefor reasonable, but the pecuniary means of some of the cottagers may be such as to require them to purchase inferior articles at a lower price. Thus the regulation, if upheld would seem to establish a uniform standard of taste and a uniform style of living."

Sec. 381. Acceptance of rent as a waiver of a lessor's right to forfeit lease for lessee's breach of covenant prohibiting use of premises for sale of intoxicants. An acceptance of rent by a landlord with knowledge of his lessee's breach of the covenant prohibiting the use of the place for the sale of intoxicants, does not bar him from enforcing a forfeiture for continuing the breach. *Granite Bldg. Ass'n v. Greene,*

R. I. (54 Atl. Rep. 792). The court say: "For while it is doubtless true that, as a general rule, a waiver of a forfeiture occurs by an acceptance of rent which became due after a breach of covenant by the lessee, which breach was known to the lessor at the time of accepting the rent (*Taylor's Landl. & Ten.* vol. 2 [8th Ed.] § 497; *McGlynn v. Moore*, 25 Cal. 384), it is also true that there are well-known exceptions to such rule. And one of these exceptions is where there is a continuing cause of the forfeiture. In such case the lessor is not precluded from taking advantage of the forfeiture from having received rent which accrued after the breach was originally committed. An example of a case of this sort which bears directly on the case at bar is that given by Mr. Taylor, *supra* (section 500), where the forfeiture was incurred by using two rooms in a house in a manner prohibited by the lease. The user under such circumstances in the cases relied on by the author in support of the text was held to be a continuing breach, and the landlord was allowed to recover after receiving rent, provided the user continued after such receipt. Thus in *Doe v. Gladwin*, 6 Q. B. 953, it was held that where a tenant, who is bound to keep the premises insured at all times during the demise, leaves them uninsured for a time, the receipt of rent is only a waiver of that portion of the breach which has occurred at the time the rent is received. See, also, *Block v. Ebner*, 54 Ind. 544; *Farwell v. Easton*, 63 Mo. 446; *Ambler v. Woodbridge*, 9 B. & C. 376. In *Manice v. Millen*, 26 Barb. 41, *Mitchell, P. J.*, in delivering the opinion of the court, said: 'The acceptance of rent is generally a waiver of a previous cause of forfeiture, if that cause were

known to the landlord. But this rule does not apply to cases of a "continuing breach." Arch. Landl. & Ten. pp. 98-101. So, where there was a covenant that rooms should not be used for certain purposes, and they were so used, and afterwards the landlord accepted rent, and the tenant continued after that to use them for the same forbidden purposes, ejectment could not be brought for the misuser prior to the payment of rent, but was sustained for the subsequent continuance of the same misuser.' In Am. & Eng. Enc. of Law, (2d Ed.) vol. 18, p. 388, under the caption "Continuing Causes of Forfeiture," the law is stated as follows: 'Some covenants and conditions are susceptible of a continuing breach. In such case a waiver of a breach extends only to past breaches, and will not preclude the lessor from taking advantage of a forfeiture incurred subsequently to such waiver. Thus a covenant to keep in repair, to keep the premises insured, to plant and keep replaced fruit trees upon the demises premises, and to pay taxes, as well as restrictions upon the use of the premises, have been held to be continuing, so that a waiver of one breach would not preclude a forfeiture for a subsequent breach.' See cases cited in support of these propositions. In short, the rule seems to be well settled that, where a condition in a lease is single, it is wholly discharged by one waiver. See *Smith v. Edgewood Club*, 19 R. I. 628 (35 Atl. Rep. 884; 36 Atl. Rep. 128). But if it be continuous, the waiver only discharged the particular breach."

Sec. 382. Renewal or extension of lease. A lessee for a definite term, with a privilege of a like additional period, sufficiently exercises his privilege of extending the term by remaining in possession after the original term. *Brown v. Samuels*, (Ky.) 70 S. W. Rep. 1047 (24 Ky. Law Rep. 1216). Where, at the expiration of a lease for a period of years, the parties being unable to agree as to the adjustment of their relations, there is such a holding over by the lessee and acceptance of rent by the lessor as creates a tenancy from year to year, the lease is "continued" so as to release the lessor from liability for improvements, under a provision in the lease that if "this lease can not be continued after expiration of said ten years, by mutual agreement of the parties," the lessor should pay for the improvements. *Parker v. Page*, 41 Or. 579 (69 Pac. Rep. 822). Where the assignee of a lease for a fixed term, containing a provision for an extension on written

notice by the lessee, continues in possession after the term and pays rent which the lessor receives, there is an extension of the lease though no written notice is given; and such assignee is liable for the unexpired portion of the extended term, though before its expiration he has assigned the lease and abandoned the premises. *Probst v. Rochester Steam Laundry Co.*, 171 N. Y. 584 (64 N. E. Rep. 504).

Sec. 383. Renewal or extension of lease—Holding over as an exercise of an option to renew. An exercise of his option to renew, given a lessee in a lease for one year "with the privilege of renewal for four years longer on the same terms," is not established merely by his holding over after the expiration of the year. *Andrews v. Marshall Creamery Co.*, 118 Ia. 595 (92 N. W. Rep. 706; 60 L. R. A. 399; 96 Am. St. Rep. 412). The court say: "There seems to be no doubt under the authorities that, where a lease provides that the tenant may have, at his option, an extension for a specified time after the expiration of the term agreed upon in the lease, or may occupy for an extended term including the term specified, the mere holding over after the expiration of the specified term will constitute an election to hold for the additional or extended term, and the tenant, after holding over beyond the first term without any new arrangements, is bound for that additional or extended term as fully and completely as though that term had been originally included in the lease when executed. *Delashman v. Berry*, 20 Mich. 292 (4 Am. Rep. 392); *Terstegge v. Society*, 92 Ind. 82 (47 Am. Rep. 135); *Montgomery v. Board*, 76 Ind. 362 (40 Am. Rep. 250); *Peehl v. Bumbalek*, 99 Wis. 62 (74 N. W. Rep. 545); *Harding v. Seeley*, 148 Pa. 20 (23 Atl. Rep. 1118); *Mershon v. Williams*, 62 N. J. L. 779 (42 Atl. Rep. 778); *Clarke v. Merrill*, 51 N. H. 415. According to this view, the continuance in possession is sufficient proof of an election to enjoy the privilege of extension provided for. *Kramer v. Cook*, 7 Gray, 550; *Stone v. Stamping Co.*, 155 Mass. 267 (29 N. E. Rep. 623); *Holley v. Young*, 66 Me. 520. In well-reasoned cases in Massachusetts the view is expressed that holding over is merely evidence of an intention to occupy under the privilege of an extension, which may be overcome by evidence of a contrary intention. *Jones v. Tilton*, 139 Mass. 418 (1 N. E. Rep. 741); *Kimball v. Cross*, 136 Mass. 300. There is good reason, however, supported by authority, for a distinction be-

tween a privilege of an extension and a right to renew. The extended term or additional term is one provided for in the lease itself, and the mere enjoyment of the privilege by continuing in possession is enough to bring the extended occupancy within the original contract. But an agreement for an option of renewal would seem to imply that the parties contemplated some affirmative act by way of the creation of an additional term. It is no doubt true that the affirmative act may be something different from, and less than, the execution of a new lease; for, when the tenant has indicated affirmatively the election to avail himself of the privilege of renewal, he has done all that is necessary to create a renewal, for the conditions under which the new term is to be enjoyed will be the same as those under which the first term was enjoyed, save as to the condition which provides for the renewal. *Brand v. Frumveller*, 32 Mich. 215; *Darling v. Hoban*, 53 Mich. 599 (19 N. W. Rep. 545); *Willoughby v. Furnishing Co.*, 93 Me. 185 (44 Atl. Rep. 612); *Orton v. Noonan*, 27 Wis. 272; *Kollock v. Scribner*, 98 Wis. 104 (73 N. W. Rep. 776). A covenant to renew gives a privilege to the tenant, but is nevertheless an executory contract, and, until the tenant has exercised the privilege, he can not be held for the additional term. *Swank v. Railway Co.*, 61 Minn. 423 (63 N. W. Rep. 1088); *Id.*, 72 Minn. 380 (75 N. W. Rep. 594). There is authority for the view that the mere holding over is sufficient evidence of an election to renew, even where that is the privilege given in the lease. *Insurance & Law Bldg. Co. v. National Bank of Missouri*, 71 Mo. 58; *Ranlet v. Cook*, 44 N. H. 512 (84 Am. Dec. 92); *Clarke v. Merrill*, 51 N. H. 415; *McBrier v. Marshall*, 126 Pa. 390 (17 Atl. Rep. 647). But with better reason, as we think, it has been held in other cases, after a full consideration of the question and the authorities bearing upon it, that the act of holding over is not sufficient to show an affirmative election to renew the lease for an additional term under a stipulation giving the privilege of such renewal. *Thiebaud v. Bank*, 42 Ind. 212; *Terstegge v. Society*, 92 Ind. 82 (47 Am. Rep. 135); *Renoud v. Daskam*, 34 Conn. 512; *Kollock v. Scribner*, 98 Wis. 104 (73 N. W. Rep. 776). The arguments in favor of the doctrine supported by the cases last cited seem to us to be controlling. The covenant of renewal itself implies the creation of a new term, and some exercise of the right of election to assume the obligations involved therein should appear. *Cooper v. Joy*, 105 Mich.

374 (63 N. W. Rep. 414); *Bradford v. Patten*, 108 Mass. 153. The distinction between the privilege of extension, involving the mere election to treat the original lease as for a longer term than that agreed upon at its execution, and the privilege of renewal, involving the creation of another term, distinct from that provided for in the lease as executed, is implied in the language selected to express the intention of the parties. Where the stipulation is for privilege of renewal, the situation at the end of the first term is this: The tenant may, if he sees fit, by any appropriate act indicating his intention to do so, and before the privilege has expired by the expiration of the term, bind himself to a new lease, the terms and conditions of which are expressed in the first lease. But, on the other hand, he may, if he sees fit, become a tenant holding over after the expiration of his term; that is, a tenant at will under the provisions of our statute—Code, § 2991; *O'Brien v. Troxel*, 76 Ia. 760 (40 N. W. Rep. 704); *Bank v. Herron*, 111 Ia. 25 (82 N. W. Rep. 430);—or, in some states, a tenant from year to year, and bound to continue in possession for an additional term, as fixed by law—*Haynes v. Aldrich*, 133 N. Y. 287 (31 N. E. Rep. 94; 28 Am. St. Rep. 636);—and by thus holding over he creates a new tenancy for an additional term, or at will, as the case may be, which he can only terminate as provided by law—*Railroad Co. v. West*, 57 O. St. 161 (49 N. E. Rep. 344); *Galdwell v. Holcomb*, 60 O. St. 427 (54 N. E. Rep. 473; 71 Am. St. Rep. 724)."

Sec. 384. Subletting. A covenant against or a statute (Mo. Rev. Stat. 1899, § 4107), prohibiting the assignment of a lease, does not deprive the lessee of the right to sublet. *Moore v. Guardian Trust Co.*, 173 Mo. 218 (73 S. W. Rep. 143). A lessee continuing in possession after the expiration of his lease, under a stipulation therein that he should surrender possession when paid the value of the building erected by him, has the right to recover rent from his subtenants until his right to possession is terminated by payment for the building. *Moshassuck Encampment No. 2 v. Arnold & Maine*, R. I. (54 Atl. Rep. 771). There is an ancient rule that a lessor, who has accepted a surrender of the leasehold from the lessee, can not thereafter recover rent from a subtenant, because neither privity of contract nor estate exists between the original lessor and the under lessee. None of the Missouri

statutes concerning landlord and tenant has altered this rule. But, if the under lessee attorns to the original lessor after the surrender of the mesne tenant, the under lessee is thereafter liable to the landlord for rent for the full term of the sublease. *McDonald v. May*, 96 Mo. App. 236 (69 S. W. Rep. 1059).

Sec. 385. Assignment of lease. A right reserved by a lessor of farm lands to enter upon the premises and sow wheat during the term is assignable. *Brewster v. Gracey*, 65 Kan. 137 (69 Pac. Rep. 199). An assignment which purports to be, not merely an assignment or conveyance of the term, but an assignment of the instrument or "indenture of the lease," transfers an option contained in the lease. *Blakeman v. Miller*, 136 Cal. 138 (68 Pac. Rep. 587; 89 Am. St. Rep. 120). An assignment of a lease is not rendered invalid by the omission of the necessary internal revenue stamps unless such an omission was the result of an intent to defraud the government, which must be proven as any other fraudulent act. *First Nat. Bank v. Stone*, Ia. (91 N. W. Rep. 1076). A statute (Vt. Stat., § 2220) requiring an assignment to be recorded "if the lease is for a longer term than one year," does not apply to the assignment of a lease to continue only so long as the lessors should continue to own the premises. *Ricard v. Dana*, 74 Vt. 74 (52 Atl. Rep. 113). An assignment or pledge of a lease by a lessee made by him in good faith as security for an indebtedness is not a violation of a condition in the lease prohibiting its transfer or assignment. *Crouse v. Mitchell*, 130 Mich. 347 (90 N. W. Rep. 32). Citing, *Riggs v. Pursell*, 66 N. Y. 199; *Pitt v. Hogg*, 4 Dowl. & R. 226; *Goodbehere v. Bevan*, 3 Maule & S. 353. The fact that a lessor assents to the assignment of the lease by the lessee does not relieve the latter from liability on his covenant to pay the rent. *Jordan v. Indianapolis Water Co.*, 159 Ind. 337 (64 N. E. Rep. 680). A sale to one of the members of a partnership holding a lease, by all the other members, of their interest in the partnership, including the lease, and an agreement by him to pay all rentals, makes him the principal debtor and they the sureties, as between themselves, as to the rents. *Doxey's Estate v. Service*, 30 Ind. App. 174 (65 N. E. Rep. 757). One succeeding to the rights of a lessor by an assignment of a lease, and who has been recognized as landlord by the lessee, upon discovery of the invalidity of his title, can not acquire an outstanding title and use it to evict his lessee; but he must

give his tenant the benefit of any outstanding title acquired during the term. *Iowa Sav. Bank v. Frink* (Neb.) 92 N. W. Rep. 916.

Sec. 386. Assignment of lease—Liability of assignee.

One taking an assignment of a lease containing a stipulation that it shall not be assigned except with the written assent of the lessor, and that all the "rights, duties, conditions and covenants" of the lease should extend to, and be binding on, "any assignee of the lessee," takes subject to any conditions named in the lessor's written assent to the assignment, and becomes primarily liable for the performance of the conditions of the lease. *Springer v. Chicago Real Estate, L. & T. Co.*, 202 Ill. 17 (66 N. E. Rep. 850). In a lease granting the privilege to draw water from a canal, a covenant to pay rent runs with the land, and an assignee of the lease is liable for the rent. *Jordan v. Indianapolis Water Co.*, 159 Ind. 337 (64 N. E. Rep. 680). Applying Kan. Gen. Stat. 1901, § 3874, providing that "a tenant may waive, in writing, the benefit of the exemption laws of this state for all debts contracted for rents," such a waiver by a lessee in a written lease becomes binding on one to whom he assigns his unexpired term and who enters into possession and pays rent under the lease. *Barhyte v. New Hampshire Real Estate Co.*, 66 Kan. 390 (71 Pac. Rep. 837). The right of a lessee, in a lease in which he has covenanted to pay the rent, who has made an assignment of the lease, to recover rents from his assignee is terminated by a judicial sale of the latter's interest in pursuance of which a deed is made. *Mayor, etc., of Baltimore v. Peat*, 93 Md. 696 (50 Atl. Rep. 152).

Sec. 387. Assignment of lease—Assignee accepting liable for rent without entering into possession. One accepting an assignment of a lease is liable for rent thereunder though he may not have entered into possession. *Collins v. Pratt*, 181 Mass. 345 (63 N. E. Rep. 946). The court say: "It must be considered a settled law in England that an assignee of a lease who has accepted it is liable for rent, whether he has entered into possession or not. *Pilkington v. Shaller*, 2 Vern. 374; *Stone v. Evans, Peake*, Add. Cas. 94; *Williams v. Bosanquet*, 1 Brod. & B. 238,—where the matter is elaborately discussed by counsel and considered by the court. This case expressly overrules *Eaton v. Jaques*, 2 Doug. 455. The law

is so stated in all the late English text-books. Fawc. Landl. & Ten. 401; Foa. Landl. & Ten. 320; Woodf. Landl. & Ten. (16th Ed.) 273. The English rule seems generally to have been followed in this country. Taylor, Landl. & Ten. (8th Ed.) § 450; 18 Am. & Eng. Enc. Law (2d Ed.) 672, note 6. In this commonwealth the precise question in the case before us does not appear to have been considered, but we find nothing in the cases in which the liability of an assignee for rent has been discussed which leads us to suppose that an entry is necessary. Thus, in *Howland v. Coffin*, 12 Pick. 125, where an action of debt for rent was brought by an assignee of the lessor against one who had 'purchased' all the rights which the lessee had in the premises, it was said by Mr. Justice Wilde: 'The action is founded on privity of estate between the parties. The defendant took the term subject to all the advantages and disadvantages attached to it by the terms of the lease. The covenant for the payment of rent ran with the land, and by the assignment of the term became binding on the defendant.' In *Blake v. Sanderson*, 1 Gray 332, the action was by the lessors against the assignee of the lease, and it was said by Mr. Justice Thomas: 'By such assignment and acceptance of the lease the defendant is bound to the performance of its conditions, and his liability for rent is to be governed by the terms of the lease, and not restricted to actual occupation.' *Simonds v. Turner*, 120 Mass. 328, is cited in some text-books as authority for the position that an entry by the assignee is not necessary. The action was brought by the lessor against an assignee to recover a betterment assessment paid by the lessor. It does not appear from the cases reported nor from the plaintiff's exceptions, which we have examined, whether the assignee had made an entry or not. The defendant took the point on this brief that, as this fact did not appear, the defendant was not liable. The opinion of the court was delivered by Chief Justice Gray, who, after holding that the betterment assessment was included in the covenant of the lease, and that the assignment had been accepted, held the assignee liable, citing, *Williams v. Bosantquet*, 1 Brod. & B. 238, and *Weider v. Foster*, 2 Pen. & W. 23, in both of which cases an entry by the assignee was held not necessary to be proved in order to bind him. We are of opinion that these cases show that an entry by an assignee need not be proved, and we should reach the same result were the question an entirely new one here."

Sec. 388. Necessity and sufficiency of consideration for parol agreement to reduce rent reserved in a written lease. In order that a parol agreement to reduce the rent reserved in a written lease may have the effect of a surrender of the old and substitution of a new lease, there must be a new consideration. Where the lessee has not covenanted and is not bound to remain in possession for any purpose, continuing in possession at the request of the lessor may constitute such a consideration. *Bowman v. Wright*, Neb.

(91 N. W. Rep. 580). In support of the last proposition, the court cite: *Doherty v. Doe*, 18 Colo. 456 (33 Pac. Rep. 165); *Hyman v. Cigar Co.*, 9 Colo. App. 299 (48 Pac. Rep. 671); *Ten Eyck v. Sleeper*, 65 Minn. 413 (67 N. W. Rep. 1026); *Cooper v. Fretnoransky* (Com. Pl.) 16 N. Y. Supp. 866.

Sec. 389. Miscellaneous notes. One under contract with a lessor to supply leased premises with heat is liable in tort to a tenant for damages resulting from his negligently permitting fires to go out. *Pittsfield Cottonware Mfg. Co. v. Pittsfield Shoe Co.*, 71 N. H. 522 (53 Atl. Rep. 807; 60 L. R. A. 116). A lessee may maintain an action to recover the penalty prescribed by Ia. Code, §§ 5078, 5081, for the obstruction of a way, on account of the obstruction of a way appurtenant to the leased premises, although the obstruction existed before the commencement of his term. *Morrison v. Chicago & N. W. Ry. Co.*, 117 Ia. 587 (91 N. W. Rep. 793). Applying a statute that there shall be but one form of action for the enforcement or protection of private rights and the redress of private wrongs, a lessee whose rights acquired by his part performance of an unacknowledged lease have been interrupted by a wrongful eviction by his lessor, may recover damages therefor. *Browder v. Phinney*, 30 Wash. 74 (70 Pac. Rep. 264). For exhaustive collation of authorities on "The liability to third persons of lessors of real or personal property," see 92 Am. St. Rep. 499-559. For case considering particular elements which may be considered in determining the damages recoverable by a lessee for breach of his lessee's covenant to deliver possession at a certain time, see *Joseph Bernhard & Son v. Curtis*, 75 Conn. 476 (54 Atl. Rep. 213).

LICENSE.

EPITOME OF CASES.

Sec. 390. Duration of license—Revocation. A license to draw water from land by wooden pipes laid thereon to a spring, obtained without any consideration, continues only during the life of the pipes and can not be extended by the licensee replacing the decayed wooden pipes with lead pipe without the consent of the owner of the land. *Ainsworth v. Stone*, 73 Vt. 101 (50 Atl. Rep. 805). Where a license to construct a ditch is given on consideration that the ditch shall be for the joint use of the licensor and licensee, the right of the licensee to use the ditch can only be lost by abandonment. *Patterson v. Mills*. Cal. (68 Pac. Rep. 1034). A parol license to use the land of another is revocable at the will of the person granting it, where it does not appear that any consideration was paid for it, or that any value was parted with on the faith that the license was perpetual. *Kibbey v. Richards*, 30 Ind. App. 101 (65 N. E. Rep. 541; 96 Am. St. Rep. 333). Equity will interfere to prevent the revocation of a license where the licensee in reliance upon it has made valuable improvements or otherwise expended money, or where the revocation of the license would operate as a great injury to his property. *Hiers v. Mill Haven Co.*, 113 Ga. 1002 (39 S. E. Rep. 444); *Dodge v. Johnson*, 32 Ind. App. 471 (67 N. E. Rep. 560). In Alabama it is held that the revocation of a parol license to construct a dam and ditch on the land of the licensor is not prevented by the fact that large expenditures have been made on the faith of it, or that it was given with knowledge that such expenditures would be made. *Hicks v. Swift Creek Mill Co.*, 133 Ala. 411 (31 So. Rep. 947; 57 L. R. A. 720; 91 Am. St. Rep. 38). See opinion for exhaustive collation and review of authorities.

Sec. 391. Revocation of license—What constitutes and rights of parties upon revocation. Where a parol license is

revocable, a conveyance of the land by the licensor operates as a revocation; and the grantee in the conveyance may maintain trespass in case the licensee attempts to act under the license after the grant. *Hicks v. Swift Creek Mill Co.*, 133 Ala. 411 (31 So. Rep. 947; 57 L. R. A. 720; 91 Am. St. Rep. 38). An adjudication in an action brought against a husband alone which amounts to a revocation of a parol license affecting lands belonging to him and his wife as tenants by entireties, also bars the licensee from enforcing the license against her. *Oster v. Broe*, 161 Ind. 113 (64 N. E. Rep. 918). Where one claiming the right under a parol license to construct a ditch across the land of another sues the latter for interfering with the ditch and recovers as damages the entire cost of its construction such recovery will operate as a revocation of the license, on the ground that such recovery amounts to a return of the expenditure which entitled the licensee to enforce his parol license. *Oster v. Broe*, 161 Ind. 113 (64 N. E. Rep. 918). A parol agreement between owners of adjoining lots, upon which they have erected a building the third and fourth stories of which are not divided by any partition wall, concerning the use of a stairway located wholly on the lot of one of them, constitutes a revocable license, which is revoked by the erecting of partition walls in the third and fourth stories of the building by the owner of the stairway. *Quimby v. Straw*, 71 N. H. 160 (51 Atl. Rep. 656). When a structure is placed upon land of another, to be used by the builder during the pleasure of the land owner, the ownership of the structure by the builder, and his right to remove it when the landowner revokes his license, is recognized and implied; and the landowner's right to revoke the license does not authorize his injury or destruction of such structure. *Salley v. Robinson*, 96 Me. 474 (52 Atl. Rep. 930; 90 Am. St. Rep. 410). One having a license to conduct a vaudeville show on fair grounds, which has been revoked on account of his willful breach of its terms, is without remedy and can not recover any part of the consideration he has paid therefor. *Mackay v. Minnesota State Agricultural Soc.*, 88 Minn. 154 (92 N. W. Rep. 539).

LIENS.

EPITOME OF CASES.

Sec. 392. Attorneys' liens. Iowa Code, § 321, relative to attorneys' liens makes no provision for such a lien on real estate involved in litigation. *Keehn v. Keehn*, 115 Ia. 467 (88 N. W. Rep. 957). The court say: "In *Ward v. Sherbondy*, 96 Ia. 481 (65 N. W. Rep. 413), and *Jennings v. Bacon*, 84 Ia. 406 (51 N. W. Rep. 15), we expressly held that our statute with reference to attorneys' liens stands in lieu of the common-law lien, and that to obtain such a lien the statute must be strictly followed. Even at common law an attorney had no lien on real estate although the land was the subject-matter of the litigation. *McCullough v. Flournoy*, 69 Ala. 189; *Hanger v. Fowler*, 20 Ark. 667; *Rowe v. Fogle*, 88 Ky. 105 (10 S. W. Rep. 426; 2 L. R. A. 708); *Martin v. Harrington*, 57 Miss. 208; *Stewart v. Flowers*, 44 Miss. 513 (7 Am. Rep. 707)—where the authorities are extensively reviewed. *Smalley v. Clark*, 22 Vt. 598; *Fowler v. Lewis' Adm'r*, 36 W. Va. 112 (14 S. E. Rep. 447). Tennessee stands alone in opposition to this well-nigh universal rule. *Hunt v. McClanahan*, 1 Heisk. 503. But even there it is said that the attorney has no lien until the real estate is sold and the sale confirmed for his client's benefit. *Perkins v. Perkins*, 9 Heisk. 97."

Sec. 393. Judgment lien. A decree in a divorce proceeding, made under Burns' Ind. Rev. Stat., § 1058, providing that a court decreeing a divorce shall make provision for the guardianship, custody, support and education of the minor children, that "the support, maintenance and education of said child is now here decreed a lien on the real estate of said A. J., the same to be paid out to the mother, or other proper person, on petition to the court, if he refuses to pay the same in such annual or semiannual sums as to the court may appear just and proper," was held not to create a lien

on the husband's realty, not being either such a definite provision as is contemplated by the statute or a final judgment within the meaning of § 617. *Matthews v. Wilson*, 31 Ind. App. 90 (67 N. E. Rep. 280). Construing and applying Kan. Gen. Stat. 1901, § 4914, it is held that where two judgment creditors have failed for more than one year after the rendition of their judgments to cause executions to issue and be levied upon the land of the judgment debtor, the one of such two who thereafter first issues and levies his execution has priority over the other, who subsequently issues and levies. *Atchison Sav. Bank v. Wyman*, 65 Kan. 314 (69 Pac. Rep. 326). For construction of California Statutes as to effect of death of judgment debtor and prosecuting of creditor's claim against his estate, upon the lien of the judgment, see in re *Wiley's Estate*, 138 Cal. 301 (71 Pac. Rep. 441).

Sec. 394. Judgment lien—Estate to which it attaches.

The interest of a devisee for whom land is devised in trust, the income to be paid to her during her life, is subject to a judgment lien, where no discretion is vested in the trustee and there is no limitation on the devisee's power of alienation by voluntary act, or in invitum by her creditors. *Ives v. Beecher*, 75 Conn. 564 (54 Atl. Rep. 207). The interest of one to whom a testator has devised an undivided half interest in lands which has vested by the death of the testator, is subject to a judgment lien subsequently obtained against the devisee pending administration. Cal. Civ. Code, § 1341; Code Civ. Proc., § 671, construed and applied. *Martinovich v. Marsicano*, 137 Cal. 354 (70 Pac. Rep. 459). The lien of a judgment obtained against a vendor who has given a bond for a deed attaches only to the purchase money remaining unpaid and due to the vendor. *First Nat. Bank v. Edgar*, Neb.

(91 N. W. Rep. 404). Property paid for by a parent and conveyed to his adult child is subject to the lien of a judgment obtained against the latter, where the child has given a mortgage thereon to his parent for the amount of the consideration and a separate debt due the parent, and there is no evidence of a trust. *Woodhurst v. Cramer*, 29 Wash. 40 (69 Pac. Rep. 501). Where a judgment which has become dormant under the provisions of a statute is revived, it will operate as a lien only on the real estate which the judgment debtor may own at the time of the revivor. *Halmes v. Dovey*, 64 Neb. 122 (89 N. W. Rep. 631). Construing and applying

Mo. Rev. Stat. 1899, §§ 3178, 3714, it is held that a judgment lien does not attach to lands held as a homestead while they sustain that character, but it does attach immediately upon their abandonment as a homestead. *Smith v. Thompson*, 169 Mo. 553 (69 S. W. Rep. 1040).

Sec. 395. Judgment lien—Estate to which it attaches—Debtor must have some interest more than mere legal title. In order for a judgment lien to attach to real estate, the judgment debtor must have some interest in it more than merely holding the legal title. *Dalrymple v. Security Loan & T. Co.*, 11 N. Dak. 65 (88 N. W. Rep. 1033). The court say: "There must be an interest to which the lien can attach. The law is well settled that the lien of a judgment does not attach to naked title, but only to the judgment debtor's interest in real estate; and if he has no interest, though possessing the naked title, then no lien attaches. *Thomas v. Kennedy*, 24 Ia. 397 (95 Am. Dec. 740). As was said by the court in *Hays v. Reger*, 102 Ind. 524 (1 N. E. Rep. 386): 'The interest which the lien of a judgment affects is the actual interest which the debtor has in the property, and a court of equity will always permit the real owner to show (there being no intervening fraud) that the apparent ownership of another is or was not real; and when the judgment debtor has no other interest, except the naked legal title, the lien of a judgment does not attach.' *Lounsbury v. Purdy*, 11 Barb. 490; *White v. Carpenter*, 2 Paige, 217; *Keirsted v. Avery*, 4 Paige, 9; *Brown v. Pierce*, 7 Wall. 205 (19 L. Ed. 134); *Hydraulic Co. v. Loughry*, 72 Ind. 562; *Moyer v. Hinman*, 17 Barb. 137; *Freem. Judgm.* §§ 355, 356; 1 Black, *Judgm.* § 421. The consensus of judicial opinion, as stated by Freeman on Judgments, is that: 'Whenever a lien attaches to any parcel of property, it becomes a charge upon the precise interest which the judgment debtor has, and no other. The apparent interest of the debtor can neither extend nor restrict the operation of the lien, so that it shall incumber any greater or less interest than the debtor in fact possesses.' The question here presented has arisen most frequently in cases where judgments have been entered against a vendor of real estate after a valid contract to convey, and before the delivery of a conveyance to the vendee. It is held that on a sale under such intervening judgment the sheriff's vendee succeeds to the precise situation of the original vendor, and becomes entitled to require and re-

ceive payment of the balance of the purchase money. As was said by the court in *Wells v. Baldwin*, 28 Minn. 408 (10 N. W. Rep. 427): 'In other words, the purchaser at such a sale would be entitled to the same rights as the vendor in the contract had, and would be compelled to make a conveyance to the vendee upon precisely the same terms upon which the vendor could have been compelled to convey.' It is well settled that the lien of a judgment attaching to real estate after a contract of sale extends only to the interest of the vendor, and is entirely subject to the contract of sale. 1 Black, Judg. § 438; *Berryhill v. Potter*, 42 Minn. 279 (44 N. W. Rep.); 251; 2 Freem. Judgm. § 364; *Filley v. Duncan*, 1 Neb. 134 (93 Am. Dec. 337, and cases cited in note)."

Sec. 396. Judgment lien—When it attaches—Docketing and indexing judgment. A correction of the entry and index of a judgment against "N. A. N.," erroneously entered and indexed as against "W. A. N." will not give it priority over a mortgage by N. A. N. in her proper name after the rendition of the judgment but before the correction of the error. *Pennsylvania Sav. Fund & L. Ass'n v. George & Co.*, 201 Pa. St. 43 (50 Atl. Rep. 300). The mere filing of a transcript of a justice's judgment with the clerk of the district court of the county does not give it the effect of a judgment of such court, under Ia. Code, § 4538, but in order to have such effect it must be entered on the judgment docket and lien index. *State Ins. Co. v. Prestage*, 116 Ia. 466 (90 N. W. Rep. 62). In Nebraska a judgment, although valid as soon as rendered, does not become a lien upon real estate, as against a subsequent purchaser without notice, until properly indexed. *German Nat. Bank v. Atherton*, 64 Neb. 610 (90 N. W. Rep. 550). Construing and applying Wis. Rev. Stat. 1898, § 2902, providing that no judgment becomes a lien upon real estate unless it be duly docketed, and § 2899, providing that a judgment can not be docketed unless it be a judgment directing the present payment of money, it is held that docketing, at the time of its rendition, of a judgment for the payment of certain yearly installments, does not create a lien even for the first installment, there being nothing to show that it was payable in advance. *Barrv v. Niessen*, 114 Wis. 256 (90 N. W. Rep. 166). A judgment is not duly docketed, within the meaning of Va. Code, § 3561, as to

any defendant in whose name it is not indexed. *Fulkerson v. Taylor*, 100 Va. 426 (41 S. E. Rep. 863).

Sec. 397. Judgment lien—Duration. The lien of a judgment upon land exists, though execution may be suspended by the death of the defendant, and may be enforced in equity without revival by scire facias, so long as the scire facias may lie on the judgment. *Maxwell v. Leeson*, 50 W. Va. 361 (40 S. E. Rep. 420; 88 Am. St. Rep. 875). A statute (Del. Laws 1893, p. 814, ch. 110, § 3), providing that after a certain date the lien of all judgments rendered prior to a certain previous time shall be lost unless renewed by agreement or scire facias, is constitutional, where the date fixed gives a reasonable time for renewal. *Devalinger v. Maxwell*, Del. (54 Atl. Rep. 684). Construing and applying *Burns' Ind. Rev. Stat.*, §§ 617, 633, 2484, it is held that a judgment ceases to be a lien on the proceeds of the sale of real estate of a deceased judgment debtor after eleven years from the date of its rendition. *Taylor v. McGrew*, 29 Ind. App. 324 (64 N. E. Rep. 651). Under *Bal. Ann. Wash. Codes & Stat.*, § 5132, the lien of a judgment expires at the expiration of five years from the rendition of the judgment, although an execution has been issued before that time. *Hardin v. Day*, 29 Wash. 664 (70 Pac. Rep. 118).

Sec. 398. Legacies as a charge on land. Where a will executed a few days before her death, by a testatrix having no personal property, makes specific devises of all her real property and certain bequests of money, the latter will constitute a charge on the real estate. *Stewart v. Robinson*, 80 Miss. 290 (31 So. Rep. 903; 92 Am. St. Rep. 603). Previous to the enactment of Md. Laws 1894, ch. 438, providing that the real estate of a testator, not specifically devised, shall be charged with the payment of pecuniary legacies when the personal estate is insufficient to satisfy them, unless a contrary intention shall clearly appear, the real estate of a testator was not chargeable with the payment of pecuniary legacies, unless a clear intention to the contrary appeared in the will, either by express words or by a fair and reasonable implication. *Ewell v. McGregor*, 96 Md. 357 (54 Atl. Rep. 113). A mortgagee of a devisee of land charged with the payment of legacies takes subject to the lien thereof, and he can not claim priority of lien over such legacies on account of the

failure of the legatees to enforce personal remedies against the devisee, where the mortgagee had given no notice to the legatees of the mortgage, nor requested them to proceed against the devisee to discharge the lien, and there was no evidence of actual damage to the mortgagee, which could have been avoided by proceedings, by the legatees against the devisee. *Conkling v. Weatherwax*, 173 N. Y. 43 (65 N. E. Rep. 855).

Sec. 399. Lis pendens and pendente lite purchasers.

The rule as to *lis pendens* has no application to independent titles, not derived from any of the parties to the suit nor in succession to them. *Merrill v. Wright*, Neb. (91 N. W. Rep. 697). Those purchasers only are affected by *lis pendens* notice who take title from parties to the suit. *Advance Thresher Co. v. Esteb*, 41 Or. 469 (69 Pac. Rep. 447). A purchaser of land pending an action affecting it, in which a *lis pendens* is filed, takes with notice of the rights of the plaintiff in the action in which the notice was filed, and is not benefited by the fact that the period of limitation elapses between the time of the grant to him and judgment in the action in favor of the plaintiff: *McLean v. Baldwin*, 136 Cal. 565 (69 Pac. Rep. 259). An action to subject to a trust lands specifically described in a petition is a *lis pendens*, and a purchaser from the defendant pending the action takes subject thereto, although he had no notice of the action. *Friedman v. Jenssen*, (Ky.) 66 S. W. Rep. 752 (23 Ky. Law Rep. 2155). One purchasing real estate after judgment rendered in the trial court, in an action in which a *lis pendens* is duly filed, becomes a purchaser *pendente lite*, and takes the chances incident to an appeal. *Farmers' Bank v. First Nat. Bank*, 30 Ind. App. 520 (66 N. E. Rep. 503).

Sec. 400. Pendente lite purchaser—Prior grantee in unrecorded deed is not. A prior grantee of one against whom an action for the specific performance of an agreement to convey the same land is subsequently brought by a third person, is not a *pendente lite* purchaser, and his title though unrecorded is not affected by the action, where he is not made a party to it. *Noyes v. Crawford*, 118 Ia. 15 (91 N. W. Rep. 799; 96 Am. St. Rep. 363). The court say: "Our statute upon the subject of *lis pendens* reads as follows: 'When a petition has been filed affecting real estate, the action is pending so as to charge third persons with notice of its pendency,

and while pending, no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's rights, if the real property affected be situated in the county where the petition is filed.' Code, § 3543. As interpreted by this court, this section 'applies only in cases when, pending the action, a third person deals with reference to the subject-matter with a party to the action.' *Sprague v. White*, 73 Ia. 674 (35 N. W. Rep. 751); *Parsons v. Hoyt*, 24 Ia. 154; *Semple v. McCrary*, 46 Ia. 37; *Bailey v. McGregor*, 46 Ia. 667; *Joseph v. McGill*, 52 Ia. 127 (2 N. W. Rep. 1007). This is also the uniform holding in other states. *Green v. Rick*, 121 Pa. 130 (15 Atl. Rep. 497; 2 L. R. A. 48; 6 Am. St. Rep. 760); *Stuyvesant v. Hone*, 1 Sandf. Ch. 419; *Parks v. Jackson*, 11 Wend. 442 (25 Am. Dec. 656); *Becker v. Howard*, 4 Hun, 361; *Gibler v. Trimble*, 14 Ohio, 323; *Clarkson v. Morgan's Devisees*, 6 B. Mon. 441; *Fogarty v. Sparks*, 22 Cal. 142; *Irvin's Lessee v. Smith*, 17 Ohio, 226; *Hunt v. Haven*, 52 N. H. 172; *French v. Loyal Co.*, 5 Leigh, 627. Mr. Pomeroy states the rule very briefly and very clearly, as follows: 'During the pendency of a suit neither party to the litigation can alienate the property in dispute so as to affect the rights of his opponent.' 2 Pom. Eq. Jur. § 633. 'A person whose interest existed at the commencement of the suit is a necessary party, and will not be bound by the proceedings unless he be made a party to the suit.' *Arnold v. Smith*, 80 Ind. 422; *Haughwout v. Murphy*, 22 N. J. Eq. 531; *Ensworth v. Lambert*, 4 Johns, Ch. 605. 'Lis pendens has no application to a third person, whose interest existed before the suit commenced, and who might have been an original party.' Bigelow, *Frauds*, 301. See, also, *Wade, Notice*, 350, 369. Indeed, we think it would be hard to find any authority to sustain the contrary proposition."

MARRIED WOMEN.

EPITOME OF CASES.

Sec. 401. Estoppels applied to married women. Under Ala. Code 1886. § 2341 et seq., a wife joining with her husband in a mortgage of his lands for the purpose of releasing her dower and homestead rights is not estopped by its covenants of warranty from setting up a title to the land subsequently acquired by her. *Threefoot v. Hillman*, 130 Ala. 244 (30 So. Rep. 513; 89 Am. St. Rep. 39). The active participation of a married woman in the perpetration of a fraud may operate, by way of estoppel, to divest her of interest in real estate. *Floyd v. Mackey*, 112 Ky. 646 (66 S. W. Rep. 518; 23 Ky. Law Rep. 2030). When a wife is the equitable owner of real estate the legal title to which stands in her husband's name, she is not estopped from setting up her equitable title against creditors of the husband, unless it appears that with her knowledge credit was extended to the husband on the faith of his apparent ownership of the land. *Smith v. Gott*, 51 W. Va. 141 (41 S. E. Rep. 175). For particular case illustrating and discussing what acts of a wife owning property which have induced others to extend credit to her husband on the faith of his ownership will estop her asserting title against them, see *Laing v. Evans*, 64 Neb. 454 (90 N. W. Rep. 246).

SEPARATE REAL ESTATE.

[In Vol. II, §§ 381-428; Vol. III, §§ 470-493; Vol. IV, §§ 466-492; Vol. V, §§ 479-508; Vol. VI, §§ 502-526; Vol. VII, §§ 455-474; Vol. VIII, §§ 457-482; Vol. IX, §§ 438-459, will be found a compilation of the statutes and decisions of the several states and territories on the subject of Separate Real Estate of Married Women. Below we give such amendments, changes and additional constructions as have been made.]

Sec. 402. Alabama.

(See Vol. II, § 381; Vol. III, § 470; Vol. IV, § 466; Vol. V, § 479; Vol. VI, § 502; Vol. VII, § 455; Vol. VIII, § 457; Vol. IX, § 438.) Under Code 1896, § 2528, a married woman may convey her separate estate without her husband joining in the deed, where he has abandoned her, or when he is a nonresident, or is imprisoned under conviction for a crime for a period exceeding two years. *Bieler v. Dreher*, 129 Ala. 384 (30 So. Rep. 22). This statute applies where both the husband and wife are nonresidents. *High v. Whitfield*, 130 Ala. 444 (30 So. Rep. 449). A married woman's mortgage of her property to secure her husband's debt is void, and can not be made the basis of an estoppel against her. *Gibson v. Clark*, 132 Ala. 370 (31 So. Rep. 472); *Russell v. Peavy*, 131 Ala. 563 (32 So. Rep. 492). A married woman who seeks to avoid a mortgage of her separate estate, which appears on its face to have been given for her debt, on the ground that the debt was that of her husband, has the burden of proving that fact. *Lunsford v. Harrison*, 131 Ala. 263 (31 So. Rep. 24).

Sec. 403. Arkansas.

(See Vol. II, § 383; Vol. III, § 471; Vol. IV, § 467; Vol. V, § 480; Vol. VI, § 503; Vol. VIII, § 458). Since the adoption of the constitution of 1874 [October 30, 1874] a married woman can convey her separate property the same as if she were single; and where she joins her husband in a deed of her land, and also relinquishes dower, the deed will convey the fee, though she acknowledge only relinquishment. *Jones v. Hill*, 70 Ark. 34 (66 S. W. Rep. 194). A wife can mortgage her separate property to secure her husband's debts, whether those debts be existing debts or debts to accrue. *Goldsmith v. Lewine*, 70 Ark. 516 (69 S. W. Rep. 308).

Sec. 404. Connecticut.

(See Vol. II, § 386; Vol. III, § 474; Vol. IV, § 468; Vol. V, § 482; Vol. IX, § 440.) Deeds heretofore made between husband and wife and by a married woman without the joinder of her husband are ratified and confirmed by Laws 1903, p. 189, § 9.

Sec. 405. Delaware.

(See Vol. II, § 388; Vol. VI, § 504.) Code 1893, p. 625, § 4. amended to read as follows: "The deed of a married woman, executed by her during her coverture, concerning lands or tenements, shall be valid and effectual as if she were sole, if she, upon private examination, apart from her husband, to be taken and certified as hereinafter provided, shall acknowledge that she executed said deed willingly, without compulsion, or threats, or fear of her husband's displeasure; but such deed shall not bind her to any war-

ranty except a special warranty against herself and her heirs, and all persons claiming by or under her; and no covenant on her part, of a more extensive or different effect in such deed, shall be valid against her. Nor shall such conveyances by her divest, abrogate, or in any manner interfere with the husband's estate by the curtesy should such estate attach. Such private examination may be taken in any county, before the chancellor, or any judge, a notary public, or two justices of the peace for the same county.

[In all cases of sales of lands and tenements under judgments, or by trustees of idiots, lunatics, and persons of unsound mind, it shall be lawful for the wife of any defendant in such judgments, or of such idiot, lunatic, or person of unsound mind, to execute, acknowledge, and deliver any conveyance, release or other instruments to bar her of dower in the land and tenements so sold without her husband being a party to such conveyance, release or other instrument.]” Laws 1903, p. 956.

Sec. 406. Florida.

(See Vol. II, § 389; Vol. III, § 475; Vol. IV, § 469; Vol. VI, § 505; Vol. VII, § 457; Vol. VIII, § 460; Vol. IX, § 441.) Fla. Const. 1885, art. 11, § 2 construed and applied—charging married woman's separate estate with liens in equity. *Smith v. Gauby*, 43 Fla. 142 (30 So. Rep. 683). Under Rev. Stat., § 2071, the care and management of a wife's separate statutory property is committed to her husband, and a decree perpetually enjoining him from making use of her property, or a portion thereof, in a particular manner, beneficial to the property, necessarily affects the interest of the wife adversely, so as to require that she be made a party to the suit in which such decree is sought. *Rawls v. Tallahassee Hotel Co.*, 43 Fla. 288 (31 So. Rep. 237).

Sec. 407. Georgia.

(See Vol. II, § 390; Vol. III, § 476; Vol. IV, § 470; Vol. V, § 483; Vol. VI, § 506; Vol. VII, § 458; Vol. VIII, § 461; Vol. IX, § 442.) Land bought by a husband for his wife, and paid for with her money, is equitably her property; and, though he takes the legal title to the same, it can not, as against a claim by her, be lawfully subjected to the satisfaction of a judgment against him, if, at the time of the creation of the debt on which the judgment is founded, credit was not given to the husband on the faith of his apparent ownership of such land. *Burt v. Kuhnen*, 113 Ga. 1143 (39 S. E. Rep. 414). The prohibition against a wife assuming the debts of her husband does not extend to preventing her from assuming the payment of incumbrances on property purchased from her husband, the removal of which is necessary to give her an unincumbered title to the property. *Lowenstein v. Meyer*, 114

Ga. 709 (40 S. E. Rep. 726). Particular evidence held sufficient to show that a wife was surety for her husband. *Jones v. Weichselbaum*, 115 Ga. 369 (41 S. E. Rep. 615).

Sec. 408. Idaho.

(See Vol. II, § 391; Vol. III, § 477; Vol. V, § 484; Vol. VII, § 459; Vol. VIII, § 462.) Rev. Stat. 1887, § 2495 is amended so as to read: "All property of the wife owned by her before marriage, and that acquired afterwards by gift, bequest or descent, or that which she shall acquire with the proceeds of her separate property, shall remain her sole and separate property to the same extent and with the same effect as the property of a husband similarly acquired." Laws 1903, p. 345. A married woman can not engage in business or recover prospective profits by reason of logs of business although the money invested in such business was her separate property before marriage, unless she be adjudged and declared a sole trader under the provisions of the statute. *McDonald v. Rozen*, Ida. (69 Pac. Rep. 125).

Sec. 409. Indiana.

(See Vol. II, § 393; Vol. III, § 479; Vol. IV, 472; Vol. V, § 485; Vol. VI, § 507; Vol. VII, § 460; Vol. VIII, § 463; Vol. IX, § 443.) Under Burns' Rev. Stat., § 6961, a married woman has no power to convey her lands except by deed in which her husband joins; and her individual contract to sell her real estate and to execute a bond for a deed is void. *Shirk v. Stafford*, 31 Ind. App. 247 (67 N. E. Rep. 542). Under Burns' Rev. Stat., § 6964, a married woman's contracts of suretyship are void; and a married woman seeking to defeat a mortgage on the ground of her suretyship is not required to show that the mortgagee knew of her relation to the transaction, *International Bldg. & L. Ass'n v. Watson*, 158 Ind. 508 (64 N. E. Rep. 23). In Ohio a married woman may bind herself by a contract of suretyship, hence it is held that a wife can not defend, on the ground of suretyship, against a note given by her husband and her in Indiana in settlement of a liability incurred on a bond given by them in Ohio. *Robison v. Pease*, 28 Ind. App. 610 (63 N. E. Rep. 479). There is no presumption that the consideration of a note given by a married woman or by her and her husband and secured by their mortgage of lands held by them by entireties was not used for the benefit of such realty, or that she is surety on the obligation, but the burden is on her to allege and prove such fact. *Guy v. Liberenz*, 160 Ind. 524 (65 N. E. Rep. 186); *Cook v. Buhrlage*, 159 Ind. 162 (64 N. E. Rep. 603). Where husband and wife owning land by entireties convey it to another who conveys to the husband in order to enable him to mortgage the same for his own benefit, which he does, and there is a secret agreement between them that

the land is to be reconveyed to them, the mortgagee who has no notice of such agreement or that the change in title was made to avoid the statutory inhibition against the wife mortgaging her land for the husband's debt, is not charged with notice of these things by the fact that the transfer of her interest to him was just before the loan was made, or that the consideration stated in the deed was nominal. *Webb v. John Hancock Mut. Life Ins. Co.*, Ind. App.

(66 N. E. Rep. 470). For statement of general rules for determining question of suretyship, and particular fact cases illustrative thereof, see *Cook v. Buhrlage*, 159 Ind. 162 (64 N. E. Rep. 603); *Guy v. Librenz*, 160 Ind. 524 (65 N. E. Rep. 186); *Andrysiak v. Satkowski*, 159 Ind. 428 (63 N. E. Rep. 854); *Field v. Campbell*, Ind. App. (67 N. E. Rep. 1040).

A recent statute provides that "any married woman who shall hereafter execute her promissory note, bond or other evidence of indebtedness, and deliver the same to any person, firm or corporation for the purpose of securing a loan, and such person, firm or corporation shall make such loan and shall pay the proceeds thereof to such married woman in cash, or by check or draft drawn payable to her order, and such married woman shall state under oath in writing the purpose for which such borrowed money is to be used, and if such affidavit shall show the same to be for her own separate use or the betterment of her property, or separate business, she shall not be permitted thereafter to claim that such loan was made for the use or benefit of any person other than herself." Laws 1903, p. 394.

Sec. 410. Iowa.

(See Vol. II, § 394; Vol. IV, § 473.) Construing and applying Code, § 3165, providing that "the expenses of the family * * * are chargeable upon the property of both husband and wife, or either of them," it is held that a creditor who has obtained a judgment against the husband for family expenses may in an equitable action subject the property of the wife to the payment thereof, without first recovering a judgment at law against the wife. *Boss v. Jordan*, 118 Ia. 204 (89 N. W. Rep. 1070).

Sec. 411. Kentucky.

(See Vol. II, § 396; Vol. III, § 480; Vol. IV, § 474; Vol. V, § 486; Vol. VI, § 508; Vol. VII, § 461; Vol. VIII, § 465; Vol. IX, § 444.) Prior to the Act of March 15, 1894 (Ky. Laws 1894, p. 176) a married woman could not mortgage her separate estate to secure her husband's debt, nor could she convey it to him for the express purpose of enabling him to do so. The act referred to above abolished the distinction which previously existed between the separate and general estate of married women, and in effect made all of her property separate estate, and gave her the right to pledge the

same for the debt, default, or misdoing of another, including her husband, if such estate shall have been set apart for that purpose by deed of mortgage or other conveyance. *Morrison v. Morrison's Assignee*, (Ky.) 68 S. W. Rep. 467 (24 Ky. Law Rep. 340). This act applies to the estate of a married woman acquired before its passage. *Morrison v. Morrison*, Ky. (69 S. W. Rep. 1102; 24 Ky. Law Rep. 786). Applying Ky. Stat., §§ 2127, 2128, it is held that land purchased by a wife with her earnings, arising by her employment by her husband as agent for another, may be held by her free from his control and it is not subject to the claims of his creditors. *Clark v. Meyers*, (Ky.) 68 S. W. Rep. 853 (24 Ky. Law Rep. 380). The same is held to be true of land purchased by a married woman with contributions made to her on account of her having at one time given birth to five children. *Lyon v. Lyon*, (Ky.) 72 S. W. Rep. 1102 (24 Ky. Law Rep. 2100). Applying Stat., §§ 2127, 2128, giving a married woman power to contract debts on her own behalf, and to sue and be sued as though she were single, it is held that where she is sued for a debt and fails to set up a defense of suretyship she is estopped to afterward assert that defense against a judgment obtained in the action against her. *Herring v. Johnston*, (Ky.) 72 S. W. Rep. 793 (24 Ky. Law Rep. 1940). Construing and applying Gen. Stat., ch. 52, art. 4, § 17, providing that "separate estates and trust estates conveyed or devised to married women may be sold and conveyed in the same manner as if such estates had been conveyed or devised absolutely, if there be nothing in the deed or will under which they are held forbidding the same, and if the husband (and trustee, if there be one,) unite with the wife in the conveyance," it is held that a separate estate created in a married woman by a will, the only restriction on which was that it should not be sold, mortgaged, or incumbered for the payment of any liability of the husband, may be sold and conveyed by her on any terms satisfactory to her, her husband joining in the conveyance. The fact that the property is thus conveyed to a third person who at once reconveys to the husband, both conveyances reciting a cash consideration, does not operate as notice to a subsequent purchaser that the purpose of the transaction was to avoid the restriction against selling or incumbering for her husband's debts; and, as against such a purchaser in good faith, she is estopped to deny that she received the recited cash consideration. *Johnson v. Mutual Life Ins. Co.*,

Ky. (69 S. W. Rep. 751; 24 Ky. Law Rep. 668). The statutory provision prohibiting a married woman from incumbering her real estate except by deed in which her husband joins, has no application to liens created by the deed through which she gets title to the land. *Blakeley v. Adams*, Ky. (68 S. W. Rep. 393; 24 Ky. Law Rep. 324).

Sec. 412. Minnesota.

(See Vol. II, § 402; Vol. IV, § 477; Vol. V, § 490; Vol. VI, § 512; Vol. VII, § 465.) Gen. Stat. 1894, § 5334, has been construed to the effect that a leasehold interest in real property belonging to a wife can not be created by an act of a husband as agent, and that such a lease is invalid and of no force. *Van Brunt v. Wallace*, 88 Minn. 116 (92 N. W. Rep. 521).

Sec. 413. Missouri.

(See Vol. II, § 404; Vol. III, § 483; Vol. IV, § 479; Vol. V, § 492; Vol. VI, § 513; Vol. VII, § 466; Vol. VIII, § 468; Vol. IX, § 447.) The husband's right to the possession of his wife's land, existing prior to the enactment of Rev. St. 1899, § 4340, is a vested right and is not destroyed by this statute as to land vesting in her before its enactment. *Vanata v. Johnson*, 170 Mo. 267 (70 S. W. Rep. 687). Where a wife sustains the relation of surety on account of a mortgage given by her and her husband to secure his debt, including her separate property, she is discharged from liability by an agreement made without her knowledge which operates to suspend the mortgagee's right to foreclose. *White v. Smith*, 174 Mo. 186 (73 S. W. Rep. 610). Rev. Stat. 1899, § 4339, 4340 construed and applied—liability of wife's separate estate for family necessities. *Megraw v. Woods*, 93 Mo. App. 647 (67 S. W. Rep. 709).

Sec. 414. Nebraska.

(See Vol. II, § 406; Vol. III, § 484; Vol. IV, § 481; Vol. VI, § 514; Vol. VII, § 467; Vol. VIII, § 469; Vol. IX, § 448.) Comp. Stat., ch. 53, § 1, making the property of a married woman liable for all debts contracted for necessities furnished to her family after execution against her husband for such indebtedness has been returned unsatisfied, is constitutional. The cause of action against the wife does not arise under this statute until an execution based upon a judgment against her husband has been returned unsatisfied. *Noreen v. Hansen*, 64 Neb. 858 (90 N. W. Rep. 937). A married woman is liable on her guaranty of a promissory note owned by and made to her order, and the purchaser of such a note is not driven to an inquiry of the purpose to which she intends to devote the proceeds of a sale thereof. *Kitchen v. Chapin*, 64 Neb. 144 (89 N. W. Rep. 632; 57 L. R. A. 914).

Sec. 415. New Jersey.

(See Vol. II, § 409; Vol. IV, § 482; Vol. V, § 494; Vol. VI, § 516; Vol. VIII, § 470; Vol. IX, § 450.) A contract by a married woman and her husband to convey her lands which is not separately acknowledged by her, in accordance with Laws 1898, p. 685, § 39, is not enforceable. *Schwartz v. Regan*, 64 N. J. Eq. 139 (53

Atl. Rep. 1086). A wife's separate estate will not be charged with the debt of her husband merely because she stood by in silence while he represented the property as his, and permitted the creditors to act in the belief that his representation was true. *Carpenter v. Carpenter's Ex'rs*, 27 N. J. Eq. 502, followed. *Kinsey v. Feller*, 64 N. J. Eq. 367 (51 Atl. Rep. 485). A mortgage of the separate property of a wife to a partnership consisting of her husband and another, reciting that it is to secure her debt to the firm, when she owes them nothing, but for which her husband is given credit on the firm books, can not be enforced, to collect his indebtedness to the firm. *Bliss v. Cronk*, 62 N. J. Eq. 496 (50 Atl. Rep. 315). A misdescription in a mortgage of a married woman's separate property given partly to secure her husband's debt may be corrected where it is based on other valuable consideration sufficient to make it valid as founded on a benefit to her. *Lewis v. Ferris*, N. J. Eq. (50 Atl. Rep. 630). A wife alone is liable for her torts, when committed in the management and control of her separate property, since the statutes relating to married women. *D. Wolff & Co. v. Lozier*, 68 N. J. L. 103 (52 Atl. Rep. 303).

Sec. 416. South Carolina.

(See Vol. II, § 418; Vol. III, § 489; Vol. IV, § 487; Vol. V, § 501; Vol. VI, § 520; Vol. VII, § 470; Vol. VIII, § 476.) A deed to a wife's land in this state not acknowledged by her privily and apart from her husband, as required by Code, § 1256, though executed in another state, is absolutely void and can not form the ground of an estoppel against her. *Smith v. Ingram*, 130 N. C. 100 (40 S. E. Rep. 984; 61 L. R. A. 878). Code, § 1837 construed and applied—liability of husband for income received from his wife's estate. *Faircloth v. Borden*, 130 N. C. 263 (41 S. E. Rep. 381).

Sec. 417. Tennessee.

(See Vol. II, § 420; Vol. III, § 490; Vol. IV, § 488; Vol. V, § 502; Vol. VI, § 521; Vol. VII, § 471; Vol. VIII, § 477; Vol. IX, § 454). A conveyance of land to a trustee for the sole and separate use and benefit of a married woman creates a special and active trust which is not within the statute of uses, and upon the death of her husband the title vests absolutely in her. *Temple v. Ferguson*, 110 Tenn. 84 (72 S. W. Rep. 455). Under Shannon's Code, § 4247, a married woman may devise real estate to her husband. *Hair v. Caldwell*, 109 Tenn. 148 (70 S. W. Rep. 610).

Sec. 418. Texas.

(See Vol. II, § 421; Vol. III, § 491; Vol. IV, § 489; Vol. V, § 593; Vol. VI, § 522; Vol. VIII, § 478; Vol. IX, § 455.) Applying Tex. Rev. Stat., art. 624, providing that no estate of inheritance or

freehold shall be conveyed unless by writing, and art. 635, providing that the husband and wife shall join in the conveyance of her separate real estate, it is held that a married woman holding the equitable title to real estate as the donee of a gift can not effectively convey it merely by surrendering possession and orally consenting that her donor shall execute a deed directly to her grantee. *Cauble v. Worsham*, 96 Tex. 86 (70 S. W. Rep. 737). Applying these sections in connection with art. 2967, giving the husband the sole management of his wife's property during marriage, it is held that he has no authority to lease her real estate for a term longer than one year without her signature to the lease. *Dority v. Dority*, 96 Tex. 215 (71 S. W. Rep. 950; 60 L. R. A. 941). The power given a husband to manage and control his wife's separate estate does not give him any interest therein, so as to make the rents and profits thereof liable for his debts. *Sullivan v. Skinner*, Tex. Civ. App. (66 S. W. Rep. 680). The sole management of the wife's separate property by the husband depends upon their living together as husband and wife, and his proper exercise of the trust. He will not be permitted, after the parties have become permanently separated, to continue in this trust, or to abuse it; and where in such a case he leases the wife's separate property without her knowledge or consent and appropriates the rents to his own use, without even paying the taxes on the property, a court may, on suit by the wife, cancel his leases and grant her the right to manage and control such estate, and enjoin him from interfering therewith. *Dority v. Dority*, 96 Tex. 215 (71 S. W. Rep. 950; 60 L. R. A. 941). Construing and applying Rev. Stat., art. 635, it is held that a conveyance of a wife's separate estate, executed by her husband and one to whom she has given a power of attorney duly executed by her alone, is valid. *Nolan v. Moore*, 96 Tex. 341 (72 S. W. Rep. 583). The fact that a married woman's husband joining in the execution of her deed to her separate property is a minor does not invalidate the deed; nor is it vitiated by the mere presence of the grantee at her privy examination. *Tippett v. Brooks*, 28 Tex. Civ. App. 107 (67 S. W. Rep. 512). A married woman can not convert her separate real estate into the community estate of herself and her husband by a conveyance reciting such purpose joined in by her husband conveying it to a trustee who in turn conveys it to the husband. *Kellett v. Trice*, 95 Tex. 160 (66 S. W. Rep. 51). A deed of her separate estate by a married woman to her husband is ineffectual to convey title, though made in exchange for community land which he joined her in conveying to another as a gift from her. *Jarrell v. Crow*, 30 Tex. Civ. App. 629 (71 S. W. Rep. 397). A married woman has no power to bind herself by an agreement to submit to arbitrators the respective rights of herself and husband to property. *Crouch v. Crouch*, 30 Tex. Civ. App. 288 (70 S. W. Rep. 595). A judg-

ment against a husband and wife may be satisfied out of her separate property without a specific direction therein to that effect. *Walters v. Cantrell*, Tex. Civ. App. (66 S. W. Rep. 790). Particular conveyances and devises held to create a separate estate in a married woman. *Sullivan v. Skinner*, Tex. Civ. App. (66 S. W. Rep. 680); *Strnad v. Strnad*, 29 Tex. Civ. App. 124 (68 S. W. Rep. 69); *Laufer v. Powell*, 30 Tex. Civ. App. 604 (71 S. W. Rep. 549).

Sec. 419. Vermont.

(See Vol. II, § 423; Vol. VI, § 523; Vol. VII, § 472.) A wife's interest in lands held by her and her husband by entireties is not her separate estate, within the meaning of Stat., § 2647, providing that neither the separate property of a wife nor its rents and profits shall be subject to the disposal of her husband, or liable for his debts. *Laird v. Perry*, 74 Vt. 454 (52 Atl. Rep. 1040; 59 L. R. A. 340). Construing and applying Stat., §§ 2209, 2646, it is held that a mortgage of a married woman's separate real estate signed and acknowledged by her and her husband, but in which only her name appeared as grantor, is void. *Deitrich v. Hutchinson*, 73 Vt. 134 (50 Atl. Rep. 810; 87 Am. St. Rep. 698).

Sec. 420. Virginia.

(See Vol. II, § 424; Vol. III, § 492; Vol. IV, § 490; Vol. V, § 504; Vol. VI, § 524; Vol. VII, § 473; Vol. VIII, § 480; Vol. IX, § 456.) The mere fact that a married woman resided in Pennsylvania during the Civil War while her husband was in the Confederate army would not so affect their marital status as to give her the rights of a feme sole, especially where she went through the lines of the belligerents to visit her husband, and where all the time they have recognized their marital relation. *Stewart v. Conrad's Adm'r*, 100 Va. 128 (40 S. E. Rep. 624). Code, § 2502 construed and applied—liability of married woman on covenants of warranty. *Augusta Nat. Bank v. Beard's Ex'r*, 100 Va. 687 (42 S. E. Rep. 694).

Sec. 421. Wisconsin.

(See Vol. II, § 427; Vol. IV, § 492; Vol. VI, § 526; Vol. IX, 459.) A covenant by a husband and wife in a deed of land made to them to assume and pay a certain mortgage thereon is binding on them, and they are liable for any deficiency that may arise upon the foreclosure sale of the premises. *Rev. Stat. 1878, §§ 2340, 2342* construed and discussed. *Citizens' Loan & Trust Co. v. Witte*, 116 Wis. 60 (92 N. W. Rep. 443).

MECHANICS' LIENS.

EPITOME OF CASES.

Sec. 422. Constitutionality and construction of mechanics' lien statutes. A statute (N. C. Laws 1901, ch. 607) making a married woman's property subject to a mechanic's lien for improvements made with her consent or procurement, is not in violation of a constitutional provision (N. C. Const., art. 10, § 6) that a married woman can not convey her property without the consent of her husband. *Finger v. Hunter*, 130 N. C. 529 (41 S. E. Rep. 890). Ky. Stat., § 2463 is constitutional. *Stewart v. Gardner-Warren Imp. Co.*, (Ky.) 70 S. W. Rep. 1042 (24 Ky. Law Rep. 1216); *Hodges v. Arvidson*, (Ky.) 66 S. W. Rep. 601 (23 Ky. Law Rep. 2078). Fla. Rev. Stat., §§ 1726-1749, providing for mechanics' and materialmen's liens, do not apply to the separate statutory property of married women. *Smith v. Gauby*, 43 Fla. 142 (30 So. Rep. 683). A bartender, whose duties are mainly manual, and who is also required to keep books as a part of his duties, is a laborer, within the meaning of the law creating a lien in favor of laborers, for their labor, upon the property of their employers. *Lowenstein v. Meyer*, 114 Ga. 709 (40 S. E. Rep. 726). Construing and applying Burns' Ind. Rev. Stat., §§ 7248-7250, giving employees of a corporation a right to a lien on its property and earnings for work performed, it is held that a notice filed by such a lien claimant in the recorder's office, in compliance with § 7249, is not rendered insufficient on account of designating the lien claimed as a "mechanic's lien"; and the claimant is entitled to a lien on all the corporate property, including earnings, whether such property is specifically described or not. *Forrest v. Corey*, 29 Ind. App. 159 (64 N. E. Rep. 45). The provision of Burns' Ind. Rev. Stat. 1894, § 7255 (Laws 1889, p. 257), making certain claims against debtors in failing circumstances liens without filing notice, refers to claims for wages for mechanics and laborers employed in and about any shop, mill, warehouse,

storeroom or manufactory; and such lien is limited in its operation to this specified class of service, and does not extend to structures other than those designated. *Sulzer-Vogt Mach. Co. v. Rushville Water Co.*, 160 Ind. 202 (65 N. E. Rep. 583), overruling, *Goodbub v. Hornung's Estate*, 127 Ind. 181 (26 N. E. Rep. 770); *Jenckes v. Jenckes*, 145 Ind. 624 (44 N. E. Rep. 632). Mechanics and laborers performing labor in the erection of machine shops, work shops, round houses, etc., for a railroad company, on land outside of its right of way, can not enforce a lien therefor, under Tex. Rev. Stat., art. 3312, but their remedy is under art. 3294. *National Bank of Cleburne v. Gulf, C. & S. F. Ry. Co.*, 95 Tex. 176 (66 S. W. Rep. 203).

Sec. 423. Improvements by vendee. The consent of the vendor to the erection of buildings on land by his vendee while in possession thereof, does not arise merely from a provision in the contract "that the vendee shall have the right of immediate possession of the property hereinbefore mentioned and described for the purpose of erecting buildings thereon," so as to subject the land to a mechanic's lien for such improvements, as against such vendor subsequently retaking it on account of his vendee's default in payments. *Beck v. Catholic University of America*, 172 N. Y. 387 (65 N. E. Rep. 204; 60 L. R. A. 315). Where a vendee of real estate is required by his contract of purchase to make certain improvements thereon, a mechanic's lien may be enforced against both the land and the improvements. *Hendrie & Bolthoff Mfg. Co. v. Holy Cross Gold Min. & Mill. Co.*, Colo. App. (68 Pac. Rep. 785). A vendee in possession of real estate under a contract of purchase entitling him to a conveyance thereof on payment of the purchase price, who has paid a part of the purchase price, becomes vested with such an equitable interest in the land as makes him the owner or proprietor thereof, within the meaning of Mo. Rev. Stat. 1889, §§ 6705, 6706, so that one furnishing labor and materials for the erection of a building on such land under a contract with him, may enforce a mechanic's lien therefor against his interest in the land, provided such lien can be enforced before his interest in the land expires under the terms of the contract; but under § 6707 such lien retains priority as to the building regardless of the forfeiture of the vendee's interest

in the land by his default. *Sawyer-Austin Lumber Co. v. Clark*, 172 Mo. 588 (73 S. W. Rep. 137).

Sec. 424. Improvements by lessee or occupant. A complete right to a lien against a leasehold estate can not be defeated by a surrender of the lease prior to its expiration and acceptance thereof by the lessor; and the same rule applies where the lessor is receiver and the acceptance of the surrender has been approved by an order of court. *McAnally v. Glidden*, 30 Ind. App. 22 (65 N. E. Rep. 291). In support of the first proposition, the court cite: *Water Co. v. Stephenson*, 22 Ind. App. 175 (53 N. E. Rep. 444); *Dobschuetz v. Holliday*, 82 Ill. 371 (6 Mor. Min. Rep. 108); *Gaskill v. Trainer*, 3 Cal. 334; *Gaskill v. Moore*, 4 Cal. 233; *Ellis v. Porter*, 8 Utah, 108 (29 Pac. Rep. 879). A stipulation in a lease prohibiting the removal of improvements from the premises unless the rent be paid, is not violated by the erection of improvements, nor does it in itself prevent the enforcement of a mechanic's lien therefor, under Ala. Code, § 2725. *Alabama State Fair & Agricultural Ass'n v. Alabama Gas Fixture & Plumbing Co.*, 131 Ala. 256 (31 So. Rep. 26). Ordinarily a lien can not be enforced against the interest of an owner for work done or materials furnished at the instance of, or under contract with, his lessee; and where a lien claimant seeks to make an exception to this rule on account of the labor or materials having been used in an improvement the lessee was required to make under the terms of his lease, he must clearly show that the materials furnished or the labor performed were actually furnished or performed in the construction of the improvements specified in the lease. *Antlers Park Regent Min. Co. v. Cunningham*, 29 Colo. 284 (68 Pac. Rep. 226). Under a statute giving a lien for labor and materials "in erecting, altering, moving or repairing a house, building or appurtenances," no lien can be enforced on a building for temporary alterations made by the lessee for his own convenience, not affixed to the building in a manner to become a part of the realty, subject to removal by the tenant, and not essential to the use and purpose for which the building was designed by its owner, and which were in fact removed by the lessee, leaving no trace of them in existence, except a few nail holes in the floor and screw holes in the wall. *Hanson v. News Publishing Co.*, 97 Me. 99 (53 Atl. Rep. 990). Construing and applying N. Y. Laws 1897, ch. 418, § 3, giving

contractors a right to a lien for improvements made on real estate "with the consent and at the request of the owner thereof," it is held that a lien can not be enforced against the owner of land for buildings placed thereon by a lessee having the right to remove them, and which were of no benefit to such owner although he gave a formal consent to their erection. *Rice v. Culver*, 172 N. Y. 60 (64 N. E. Rep. 761). Real estate purchased by one who purposely places it in the hands of his insolvent brother for the erection of a business house thereon, may be subjected to a lien for the construction of such building where the owner has full knowledge of his brother's insolvency, as well as the construction of the building and furnishes money to make payments thereon. *Lengelsen v. McGregor*, 162 Ind. 258 (67 N. E. Rep. 524).

Sec. 425. Subcontractors and material men. One furnishing posts to a contractor fencing a railroad may have a lien for the value thereof against the railroad, independent of any set-off allowed against him in favor of the contractor because of the posts not making extra anchorage unnecessary, as guaranteed, it appearing that the railroad got such a fence as it contracted for. *Indiana Ry. Co. v. Wadsworth*, 29 Ind. App. 586 (64 N. E. Rep. 938). Where the owner of a building has accepted from a subcontractor certain fixtures and machinery placed in a power house as fully completed and had for more than four months been in the possession thereof, the contractor ceased to be the agent of the owner, in the absence of an objection by the latter that the contract had not been completed, to order additional materials that might be made the basis for an extension of the time in which to file a lien for the original work and materials furnished by the subcontractor. *Sulzer-Vogt Mach. Co. v. Rushville Water Co.*, 160 Ind. 202 (65 N. E. Rep. 583).

Sec. 426. Subcontractors and material men—Statutes construed. Ark. Laws 1899, p. 145, amending Sand. & H. Ark. Dig., § 6251, providing for a lien for materials furnished for the construction of a railroad, does not apply to materials furnished under a contract executed before the passage of the act; nor does it give a lien for supplies furnished employees of subcontractors not in privity with the railroad company. *Choctaw & M. R. Co. v. Speer Hardware Co.*, Ark. (71 S. W. Rep. 267). Ark. Laws 1895, p. 225, § 18 construed

and applied—liability of owner making payments to contractor before laborers and materialmen have been paid. *Barton v. Grand Lodge I. O. O. F.*, 70 Ark. 613 (70 S. W. Rep. 305). A constitutional provision (Cal. Const., art. 20, § 15), giving mechanics and materialmen the right to a lien, does not authorize a statute (Code Civ. Proc., § 1203), exacting a bond from a building contractor for the protection of materialmen. *Shaughnessy v. American Surety Co.*, 138 Cal. 543 (71 Pac. Rep. 701). Although a laborer or materialman serving the notice required by Cal. Code Civ. Proc., § 1184, on the owner of a building does not acquire any lien thereon, he does acquire an interest in the unpaid balance of the contract price which he may enforce in equity. *Weldon v. Superior Court*, 138 Cal. 427 (71 Pac. Rep. 502). Cal. Code Civ. Proc., § 1187 construed and applied—notice by owner of contractor's cessation from labor. *Boscow v. Patton*, 136 Cal. 90 (68 Pac. Rep. 490). A statute (Fla. Rev. Stat., § 1743) providing that the lien in favor of the subcontractor shall exist for the amount due by the owner to the contractor at the time of the service upon the owner of notice of the subcontractor's claim of lien, refers to the amount due by the owner on account of the improvements made by the contractor for the owner. Other indebtedness of the owner to the contractor at the time of the service of such notice will not entitle the subcontractor to a lien under this statute. *Hathorne v. Panama Park Co.*, Fla. (32 So. Rep. 812). Construing and applying *Hurd's Ill. Rev. Stat. 1899*, p. 1106, § 6, it is held that a lien can not be claimed for work or materials furnished under a verbal contract which does not specify any time for payment. To create a lien under this statute for work or materials furnished under a verbal contract, they must be furnished within one year from its date and the contract must provide for payment within that time. *M. Pugh & Co. v. Wallace*, 198 Ill. 422 (64 N. E. Rep. 1005); *Hindert v. American Trust & Sav. Bank*, 198 Ill. 538 (64 N. E. Rep. 1008); *Dymond v. Bruhns*, 200 Ill. 292 (65 N. E. Rep. 641). For further construction of this statute, see *Williams v. Rittenhouse & Embree Co.*, 198 Ill. 602 (64 N. E. Rep. 995). Where a contractor's contract with the owner is insufficient to give him a right to a lien, under Ill. Laws 1895, p. 225, § 6, on account of its failure to specify a time for performance and payment, a subcontractor can not enforce a lien. *Von Platten & Dick v. Winterbotham*, 203 Ill. 198 (67 N. E. Rep. 843).

For particular contract held to fix the time of payment with sufficient definiteness to entitle the contractor to a lien, see *Webbe v. Curran*, 198 Ill. 18 (64 N. E. Rep. 710). 2 Starr & C. Ann. Ill. Stat. 1896, p. 2572, § 24 construed and applied—lien for materials furnished for public improvement, on money due contractor—notice. *National Bank of La Crosse v. Pettersson*, 200 Ill. 215 (65 N. E. Rep. 687). It is the furnishing of material for a building which entitles one to a lien, under Ia. Code, § 3089, and its actual use in the construction thereof need not be shown. *Frudden Lumber Co. v. Kinnan*, 117 Ia. 93 (90 N. W. Rep. 515). A subcontractor filing a statement and serving notice on the owner, in accordance with Ia. Code, § 3094, after the contractor has been paid in full under his contract, may enforce a lien on sums still due him by the owner for extra work. *Shope v. Mitchell*, 116 Ia. 636 (88 N. W. Rep. 813). A lien claimant giving due notice of his claim to an owner having sufficient funds owing to the contractor with which to liquidate the same, may enforce it against such owner, where, after the notice, he applies the funds to the payment of other debts of contractor for which no liens are claimed. *Frudden Lumber Co. v. Kinnan*, 117 Ia. 93 (90 N. W. Rep. 515). Under Ky. Stat., § 2463 one furnishing materials to a contractor to be used and which are used in a building on the land of another, may enforce a lien therefor, by filing a lien statement according to law, though the owner may owe the contractor nothing, and though the materials were purchased by the contractor in his own name, and not as agent of the owner. *Browinski v. Pickett*, Ky. (68 S. W. Rep. 408; 24 Ky. Law Rep. 305). Construing and applying Ky. Stat., § 2467, providing that no lien shall exist in favor of a subcontractor in case the contractor himself is not entitled to a lien, it is held that a subcontractor serving a notice on the owner who is indebted to his contractor is not entitled to any lien where such owner is afterwards compelled to assume control of the building on account of the delays of the contractor, and expend the amount of the indebtedness in completing the same. *Watts v. Metcalf*, (Ky.) 66 S. W. Rep. 824 (23 Ky. Law Rep. 824). Mass. Pub. Stat., ch. 191, § 1, giving a lien for materials "furnished and actually used in the erection," etc., of private buildings, etc., does not authorize a lien for lumber furnished a contractor for the purpose of constructing forms to hold the concrete in place while it was hardening, and centers to hold up concrete arches, where such

lumber was used elsewhere by the contractor for similar purposes and finally partly sold for wood and partly retained by him. *Kennedy v. Commonwealth*, 182 Mass. 480 (65 N. E. Rep. 828). Mass. Pub. Stat., ch. 191, §§ 3, 5 construed and applied—notice by materialman to owner. *McDowell v. Rockwood*, 182 Mass. 150 (65 N. E. Rep. 65). Minn. Laws 1899, ch. 277 construed and applied—when right to a lien for labor or material accrues. *Clark v. Anderson*, 88 Minn. 200 (92 N. W. Rep. 964). Mo. Rev. Stat. 1899, § 4203 construed and applied—particular evidence held to show that a lessee was agent of the owner to procure work so as to give a subcontractor a lien therefor. *Winslow Bros. Co. v. McCully Stone Mason Co.*, 169 Mo. 236 (69 S. W. Rep. 304). N. J. Pub. Laws 1898, p. 538, § 8 provides that “any addition erected to a former building, and any fixed machinery or gearing, or other fixtures for manufacturing purposes shall be considered a building, for the purposes of this act;” and under this statute it is held that machines furnished to become parts of such a building are materials for which a lien may be filed under that law. *Campbell v. John W. Taylor Mfg. Co.*, 64 N. J. Eq. 344 (51 Atl. Rep. 723). N. J. Laws 1898, p. 538 construed and applied—rights of lien claimant serving “stop notice” on owner. *Taylor v. Reed*, 68 N. J. L. 178 (52 Atl. Rep. 579); *South End Imp. Co. v. Harden*, N. J. Eq. (52 Atl. Rep. 1127); *Adams v. Wells*, 64 N. J. Eq. 211 (53 Atl. Rep. 610); *Kreutz v. Cramer*, 64 N. J. Eq. 648 (54 Atl. Rep. 535); *English v. Warren*, N. J. Eq. (54 Atl. Rep. 860). N. J. Pub. Laws, 1892, p. 369 construed and applied—lien for materials furnished for public improvement. *James P. Hall Inc. Co. v. Mayor, etc., of City of Jersey City*, 62 N. J. Eq. 489 (50 Atl. Rep. 603). Wis. Rev. Stat. 1898, §§ 3314, 3315, do not give a subcontractor of a subcontractor any right to a lien, and materialmen occupying such a position can not establish liens on the theory that the first subcontract had been made to defraud them, by placing them in a disadvantageous position, without proof of the participation of the owner in the conspiracy. *Dallman v. Clasen*, 116 Wis. 113 (92 N. W. Rep. 565).

Sec. 427. Subcontractors and material men—How far affected by payments to or contracts with principal contractor. It is held that the execution by a contractor of a bond to an owner to indemnify him for claims of subcon-

tractors does not of itself create such an implied obligation on his part to see to the payment of subcontractors' claims as will prevent him making payments to the contractor, even in accordance with the terms of the contract, without seeing that subcontractors' claims were satisfied. *Slagle v. De Gooyer*, 115 Ia. 401 (88 N. W. Rep. 932). Cal. Code Civ. Proc., § 1184, providing that "as to all liens except that of the contractor, the whole contract price shall be payable in money" and making contracts not in conformity therewith so far invalid as to furnish the owner no protection from the right of subcontractors and materialmen to liens, is held unconstitutional. *Stimson Mill Co. v. Braun*, 136 Cal. 122 (68 Pac. Rep. 481; 57 L. R. A. 726; 89 Am. St. Rep. 116). Ky. Stat., § 2463 casts upon the landowner the duty, to the extent of the full contract price of the improvement to be made, of seeing to it that the materialmen who have furnished material for the work provided for by the contract are paid; and no payment made by him to his contractor will relieve him of this duty, even though made without notice of the claims of mechanics and materialmen. *N. O. Nelson Mfg. Co. v. Mann*, (Ky.) 71 S. W. Rep. 851 (24 Ky. Law Rep. 1547).

Sec. 428. Priority of mechanics' liens—Priority as to buildings. In determining the priority over a mortgage, of a lien claimed against the property of a mining company for materials furnished it for the development of its mines, on an open account, it is held that where all the items relate to one continuous transaction between the parties, although the goods were delivered on separate orders, and at different dates, within short intervals of each other, and the dealings of the parties indicate an expectation to continue such business relations, the transactions constitute a continuous running account, regardless of intervening irregular monthly balances in the account, which dates from the date of the last item delivered, and relates back to the time of the first delivery of material under that course of dealing or contract shown. *Utah Rev. Stat. 1898*, §§ 1372, 1381, 1384, 1385, 2000 construed and applied. *Fields v. Daisy Gold Min. Co.*, 25 Utah, 76 (69 Pac. Rep. 528). Construing and applying 3 Mills' Ann. Colo. Stat., § 2884, providing that mechanics' liens shall attach to a building in preference to any prior mortgage upon the land on which the same is erected, it is held that such liens do not have priority over a previously recorded

mortgage, as to the building, to the extent funds secured by it were used in the construction of such building. *Joralman v. McPhee*, 31 Colo. 26 (71 Pac. Rep. 419). The court say: "Where mechanics and materialmen have notice of the existence of a mortgage which is given expressly for the purpose of securing funds to construct an improvement, and know that the funds obtained are being applied, in that way, their rights must be held subordinate to that of the mortgagee, to the extent of such advances, because of this knowledge. In other words, when they know that a structure upon which they are engaged has been pledged as security for advances to be applied towards its construction by a contract entered into before the work of erection was commenced, they are bound by such an arrangement, up to the extent that funds under such contract are actually advanced and applied to construct the building. *Lumber Co. v. Danner*, 3 N. Dak. 470 (57 N. W. Rep. 343); *Kiene v. Hodge*, 90 Ia. 212 (57 N. W. Rep. 717); *Hoagland v. Lowe*, 39 Neb. 397 (58 N. W. Rep. 197); *Land Co. v. Leavenworth*, 42 Neb. 715 (60 N. W. Rep. 954); *Association v. Campbell*, 13 App. D. C. 581 (43 L. R. A. 622)." For exhaustive note on "Mechanics' liens upon buildings distinct from the land," see 62 L. R. A. 369-382.

Sec. 429. Abandonment by contractor—Rights of parties. An owner completing a house after one with whom he had contracted for its construction had abandoned his contract, does not waive his rights under such contract by making changes in the plans such as are frequently made by an owner during the construction of a house. Persons claiming liens for labor and materials furnished after such abandonment may assert liens for the full amount, but their claims for materials furnished and work done before the abandonment must be reduced so that the amount of their liens therefor will constitute such a proportion of the amount of their claims as the original contract cost of the house bears to the actual cost, constructed in accordance with the original contract. *Delray Lumber Co. v. Keohane*, Mich. (92 N. W. Rep. 489). For particular fact case as to the effect of insolvency of contractor and his abandonment of contract, on rights of materialman, see *McConnell v. Hewes*, 50 W. Va. 33 (40 S. E. Rep. 436).

Sec. 430. Bond of contractor—Rights of laborers and materialmen—Liability of sureties. One furnishing labor or materials to one who has contracted with the United States to erect a building, may maintain an action in the name of the United States for his own use on such contractor's bond given to the United States obliging him to pay all persons furnishing him labor or materials, as required by 28 U. S. Stat., 278. *United States v. Rundle*, 27 Wash. 7 (67 Pac. Rep. 395). A bond with sureties given by contractors to a railroad company for which they have agreed to erect certain buildings, binding them to "well and faithfully pay all laborers, mechanics, materialmen, and persons who supply such contractors with provisions or goods of any kind, all just debts due to such persons or to any other person to whom any part of such work is given incurred in carrying on such work agreed to be done and performed," and from the recitals of which it clearly appears that it was given to such company as additional security to save it from any liability for such claims, will be construed as an indemnity bond and not to give laborers or materialmen any right of action thereon. *National Bank of Cleburne v. Gulf, C. & S. F. Ry. Co.*, 95 Tex. 176 (66 S. W. Rep. 203). Sureties on the bond of a contractor conditioned for the performance of his contract which merely requires him to furnish necessary labor and materials and perform the work in a workmanlike manner, are not liable to the owner for sums he has been required to pay, in addition to the contract price, to discharge liens filed by creditors of the contractor. *Boas v. Maloney*, 138 Cal. 105 (70 Pac. Rep. 1004).

Sec. 431. Loss or waiver of lien. The fact that the principal debtors in a suit to enforce a mechanic's lien have been discharged of the debt by proceedings in bankruptcy under the federal act of 1898, pending such suit, does not defeat the lien. *Holland v. Cunliff*, 96 Mo. 67 (69 S. W. Rep. 737). Subcontractors taking notes of the owner for the amount of their claims do not thereby waive their right to a lien. *Kendall v. Fader*, 199 Ill. 294 (65 N. E. Rep. 318). The right of a contractor constructing a railroad to have a lien for labor and materials is not waived by his mere agreement to take bonds, stock, etc., in payment therefor, but is only lost in so far as payment was actually made to him in accordance with the contract. *Baumhoff v. St. Louis & K. R. Co.*, 171 Mo. 120 (71 S. W. Rep. 156; 94 Am. St. Rep. 770). See

opinion for exhaustive collation of cases on waiver of mechanics' lien.

Sec. 432. Loss or waiver of lien—Destruction of the improvements. The destruction of the improvements on land after the filing of a mechanic's lien against it does not avoid the lien, especially where the main part of the improvements for which the lien was claimed was in a detachable building which was not destroyed. *Armijo v. Mountain Electric Co.*, N. Mex. (67 Pac. Rep. 726). The court say: "The amended answer says, in substance, that the Armijo House was totally destroyed by fire on February 10, 1897, together with all improvements thereon, alterations thereof, and repairs thereto made by George H. Miles. This, we presume, means that the wiring, fixtures, and such part of the electrical improvements as were in the Armijo House were destroyed by fire; but the pleader is careful not to set up that the power house, in which were the main part of the improvements, was so destroyed, and we therefore assume they were not, especially as the attorneys for appellee in their brief, in commenting on the case, state that the power house did not burn. We are well aware that the rule of law as to whether a mechanic's lien for improvements made on a lot can be recovered when such improvements are destroyed is held differently in the different states; those states which follow the law as laid down in Pennsylvania holding that such recovery can not be had, while states which do not follow Pennsylvania—and it seems to us that they base their opinions on the better reasoning, and are in greater number—hold to the contrary rule. *Stuart v. Broome*, 59 Tex. 466; *McLaughlin v. Green*, 48 Miss. 175; *Paddock v. Stout*, 121 Ill. 571 (13 N. E. Rep. 182); *Gaty v. Casey*, 15 Ill. 189; *Steigleman v. McBride*, 17 Ill. 300; *Ellett v. Tyler*, 41 Ill. 449; *Schwartz v. Saunders*, 46 Ill. 18; *Clark v. Parker*, 58 Ia. 509 (12 N. W. Rep. 553); *Smith v. Newbaur*, 144 Ind. 95 (42 N. E. Rep. 40; 33 L. R. A. 685); *Freeman v. Carson*, 27 Minn. 516 (8 N. W. Rep. 764). Nowhere, however, have we been able to find any case which holds that, where the improvements were in a detached building erected on a lot on which were other buildings which were destroyed by fire, but the detached building was not so destroyed, that the lien would fail. To so hold would be against reason, as it would be saying that, if a portion of the security held by a creditor was

destroyed, he must lose the remainder of such security, and not apply the same to the collection of his debt."

Sec. 433. Filing of lien statement—Subcontractors and materialmen. A lien statement for materials is sufficient for materials furnished by the claimant, although it does not state in express terms that they were furnished by him, but he can not enforce a lien thereunder for materials furnished by another without an allegation to that effect. *Sickman v. Wollett*, 31 Colo. 58 (71 Pac. Rep. 1107). A lien statement for materials furnished which gives the items in detail, but does not in all instances give the price of the separate items, and where this is not done several items are grouped, and the price for the whole is given as the estimated price therefor, is held sufficient under the statute of Iowa. *Queal v. Stradley*, 117 Ia. 748 (90 N. W. Rep. 588). A statement for a lien claimed for materials amounting in the aggregate to the sum of \$886.75, which contains one item, "Estimate furnished, \$485," is insufficient, under W. Va. Code, ch. 75, §§ 3, 4. *Niswander v. Black*, 50 W. Va. 188 (40 S. E. Rep. 431).

Sec. 434. Filing of lien statement—Time for filing—Extension of time. A lien statement filed before the right to a lien has accrued is ineffectual. *Clark v. Anderson*, 88 Minn. 200 (92 N. W. Rep. 964). Under a statute (Mass. Rev. Laws, p. 1700, ch. 197, §§ 1, 6) giving a lien to "a person to whom a debt is due" for material or labor furnished, and providing for the filing of a lien statement "within thirty days after he ceased to labor on or to furnish labor or materials for the building or structure," it is held that where labor and materials were furnished under an entire contract, a lien statement filed before the completion of this contract is premature and creates no lien. *General Fire Extinguisher Co. v. Chaplin*, 183 Mass. 375 (67 N. E. Rep. 321). Citing *Higley v. Ringle*, 57 Kan. 222 (45 Pac. Rep. 619); *Catlin v. Douglass*, (C. C.) 33 Fed. Rep. 569; *Roylance v. San Luis Co.*, 74 Cal. 273 (20 Pac. Rep. 573); *Willamette v. Los Angeles Company*, 94 Cal. 229, 237, 238 (29 Pac. Rep. 629); *Foushee v. Grigsby*, 12 Bush, 75-79. The time for filing of a subcontractor's lien for materials furnished on the order of the principal contractor can not be extended by an order given by such contractor for additional material after the owner of the building has accepted the building as complete and has been in possession thereof

for four months without objecting that the contract was not completed. *Sulzer-Vogt Mach. Co. v. Rushville Water Co.*, 160 Ind. 202 (65 N. E. Rep. 583). The time for filing a lien for materials for the construction of a building, furnished continuously and at short intervals as needed, but under a general contract, dates from the furnishing of the last item, though the prices for the materials were fixed at different times. *Hensel v. Johnson*, 94 Md. 729 (51 Atl. Rep. 575).

Sec. 435. Filing of lien statement—Formal requisites—Verification. In Alabama, a statement of the unpaid balance due the plaintiff is sufficient, without declaring in terms that all just credits have been given; and the verification of a lien claimed by a corporation by the affidavit of a person describing himself as a member of such corporation, is sufficient. *Alabama State Fair & Agricultural Ass'n v. Alabama Gas Fixture & Plumbing Co.*, 131 Ala. 256 (31 So. Rep. 26). A lien statement showing that the claimant entered into a written contract bearing a certain date to erect a building and provide all labor and materials for the same, and that he commenced construction thereof immediately upon the execution of the contract and completed the building on a certain date, sufficiently complies with Ill. Laws 1887, p. 219, requiring the statement to set forth "the times when such materials was furnished or labor performed." *Kendall v. Fader*, 199 Ill. 294 (65 N. E. Rep. 318). A lien statement which correctly gives the dimensions of a lot on which the improvements for which the lien is sought were made, is not rendered insufficient by the fact that it locates the lot wholly on lot 19, when in fact it and the building projected about two feet over lot 18, as shown by the city plat. *Sawyer-Austin Lumber Co. v. Clark*, 172 Mo. 588 (73 S. W. Rep. 137). N. Y. Laws 1897, p. 518, ch. 418, § 9 construed and applied—necessary contents of notice of lien. *Manley v. German Bank of Buffalo*, 174 N. Y. 499 (67 N. E. Rep. 117). N. Y. Laws 1882, ch. 410, § 1825, providing that lien claims against a city shall be verified by the claimant "by his oath or affirmation," is complied with by a verification made by an agent of the lienor. *McDonald v. Mayor, etc., of City of New York*, 170 N. Y. 409 (63 N. E. Rep. 437). The fact that the verification of a lien statement precedes the statement of account and description of the property, required by Mo. Rev. Stat., 1889, § 6709, though referring to the "preceding and foregoing statement and description,"

does not render it insufficient. *Williams v. Stroub*, 168 Mo. 346 (67 S. W. Rep. 875).

Sec. 436. Filing of lien statement—Mistakes and inaccuracies—Including non-lienable items. A claim for more than is due the claimant, made in good faith through a mistake does not invalidate the claim, where the excess embraced items easily separable and where no one is prejudiced. *Kendall v. Fader*, 199 Ill. 294 (65 N. E. Rep. 318). Knowingly and consciously making an untrue and excessive claim will defeat the right to a lien; and where it appears upon the face of the claim or by proof that a claim is untrue or excessive, the court must be satisfied that the erroneous part of the claim was made in good faith, or the lien will fail. *Camden Iron Works v. City of Camden*, 64 N. J. Eq. 723 (52 Atl. Rep. 477). See opinion for discussion of this subject. Applying S. Dak. Comp. Laws, § 5470, requiring a lien claimant to file a "just and true account of the demand due him," it is held that where a party files an account which he knows is not just and true, for the purpose of defrauding the owner of the property, the law will not aid him in enforcing his lien. *Bohn Mfg. Co. v. Keenan*, 15 S. Dak. 377 (89 N. W. Rep. 1009). Citing, *Gibbs v. Hanchette*, 90 Mich. 657 (51 N. W. Rep. 691); *Mercantile Co. v. Mosser*, 105 Mich. 18 (62 N. W. Rep. 1120); *Lynch v. Cronan*, 6 Gray, 531; *Foster v. Schneider*, (Sup.) 2 N. Y. Supp. 875; *Whitenack v. Noe*, 11 N. J. Eq. 321; *Reeve v. Elmendorf*, 38 N. J. L. 125; *Hoffman v. Walton*, 36 Mo. 613; *Stubbs v. Railway Co.*, 65 Ia. 513 (22 N. W. Rep. 654); *Phil. Mech. Liens*, § 355. Where a lien claimant in good faith includes in his statement items for which he is not entitled to a lien on account of having been furnished farther back than the time allowed for filing the lien, he may be permitted by proof to segregate the lienable from the non-lienable items. *Wolfley v. Hughes*, Ariz. (71 Pac. Rep. 951).

Sec. 437. Enforcement of lien—General principles. In Illinois it is held that proceedings to enforce a mechanic's lien are governed by the statute in force at the time the contract under which the lien is claimed was entered into. *Kendall v. Fader*, 199 Ill. 294 (65 N. E. Rep. 318). The right to a mechanic's lien against a leasehold estate is not defeated by a surrender of the lease prior to its expiration, and acceptance thereof by the lessor; but if, in such a case, the lessor is

a receiver, the lien can not be enforced against the leasehold estate by a sale in the ordinary way, but equity will direct payment by the receiver. *McAnally v. Glidden*, 30 Ind. App. 22 (65 N. E. Rep. 291). Construing and applying Burns' Ind. Rev. Stat., § 7259, requiring an action to enforce a mechanic's lien to be brought within one year, it is held that mortgagees who were not made parties to a suit to foreclose a mechanic's lien on the mortgaged premises may, after the expiration of the year, enjoin a sale of the property under a decree foreclosing the lien; but a personal judgment obtained in such foreclosure becomes an enforceable lien against the mortgagor's equity of redemption when not cut off by the mortgage foreclosure. *Martin v. Berry*, 159 Ind. 566 (64 N. E. Rep. 912). Wash. Laws 1893, p. 37, ch. 24, § 12 construed and applied—recovery and enforcement of personal judgment. *Marks v. Pence*, 31 Wash. 426 (71 Pac. Rep. 1096). For case construing numerous Washington statutes, and determining questions of pleading, practice and evidence, in actions to foreclose mechanic's liens, see *Powell v. Nolan*, 27 Wash. 318 (67 Pac. Rep. 712; 68 Pac. Rep. 389). A foreclosure can not be sustained where the only evidence is the certificate of the lien itself and proof of the computation of the amount due. *Urlau v. Weeth*, 63 Neb. 883 (89 N. W. Rep. 427).

Sec. 438. Enforcement of lien—Against buildings only. The right of one claiming a mechanic's lien to enforce it against an improvement for the construction of which it is claimed, under a statute (Mo. Rev. Stat. 1889, §§ 6705-6707) preferring such a lien to the lien of prior incumbrancers upon the land, and permitting the sale and removal of said building in the enforcement of such lien, is not affected by the fact that the equitable owner of the land with whom he contracted for the making of such improvements has lost his interest therein by default in payment of the purchase price. *Sawyer-Austin Lumber Co. v. Clark*, 172 Mo. 588 (73 S. W. Rep. 137). Upon foreclosure of mechanics' liens having priority as to buildings on lands upon which another holds a prior mortgage, the court may order a separate valuation of the land and the improvements, direct their sale together, and the division of the proceeds between the parties in the proportion of such valuations, when it appears that it would be destructive to the interests of the parties to direct a sale which would per-

mit the purchaser to remove the improvements. *Joralman v. McPhee*, 31 Colo. 26 (71 Pac. Rep. 419).

Sec. 439. Enforcement of lien—Complaint. A complaint to enforce a mechanic's lien must allege that the lien claim filed was verified where the statute requires such verification. Ky. Stat., § 2468 applied. *Newport & Dayton Lumber Co. v. Lichtenfeldt*, (Ky.) 72 S. W. Rep. 778 (24 Ky. Law Rep. 1969). The enforcement of a mechanic's lien by a builder will not be denied on account of his failure to allege in his complaint the procuring of the architect's certificate of completion, as required by his contract, where complete performance of his contract in every other particular is alleged and a good excuse given for the failure to furnish such certificate. *Mindeman v. Douville*, 112 Wis. 413 (88 N. W. Rep. 299). A complaint by a subcontractor to enforce a lien must show that at the time of his service of notice upon the owner, as required by Fla. Rev. Stat., § 1743, there was something due the contractor by the owner on account of the improvements made by the contractor for such owner. *Hathorne v. Panama Park Co.* Fla. (32 So. Rep. 812). An allegation in a complaint to enforce a lien for materials furnished under a contract providing that they were to be subject to the inspection and approval of the defendant, that the materials for which the lien is claimed were received and used by the defendant sufficiently alleges his satisfaction with such materials. *Childs Lumber & Mfg. Co. v. Page*, 28 Wash. 128 (68 Pac. Rep. 373). For cases determining sufficiency of particular complaints, see *Lengelsen v. McGregor*, 162 Ind. 258 (67 N. E. Rep. 524); *Sawyer-Austin Lumber Co. v. Clark*, 172 Mo. 588 (73 S. W. Rep. 137).

Sec. 440. Enforcement of lien—Statute of limitations. Burns' Ind. Rev. Stat., § 7255, giving to certain persons and claims a preference without the filing of the notice of lien, does not extend the time for enforcing the lien, fixed by § 7259. *Smith v. Tate*, 30 Ind. App. 367 (66 N. E. Rep. 88). Where an action to foreclose a mechanic's lien is regularly brought against the owner of the premises within one year, as required by Kan. Gen. Stat. 1901, § 5121, the contractor whom the statute requires to be made a party may be made a party after the expiration of the year. *Western Sash & Door Co. v. Heiman*, 65 Kan. 5 (68 Pac. Rep. 1080). Under 2 Bal. Ann. Wash. Codes & Stat., § 5908, an action to enforce a mechanic's

lien must be commenced within eight months after the lien claim has been filed. *Peterson v. Dillon*, 27 Wash. 78 (67 Pac. Rep. 397).

Sec. 441. Enforcement of lien—Attorney's fees—Interest and costs. An allowance of attorney's fees is not permissible where the statute (Ill. Laws 1887, p. 219) makes no provision for it. *Kendall v. Fader*, 199 Ill. 294 (65 N. E. Rep. 318). A statute (N. Mex. Comp. Laws 1897, § 2229) authorizing the allowance as part of the costs, of a reasonable attorney's fee, is constitutional. *Genest v. Las Vegas Masonic Bldg. Ass'n*, N. Mex. (67 Pac. Rep. 743). The amount of attorney's fees is within the discretion of the court and may be fixed by it irrespective of any amount mentioned in the complaint or sworn to by the attorneys. *Armijo v. Mountain Electric Co.* N. Mex. (67 Pac. Rep. 726). Under *Burns' Ind. Rev. Stat.*, § 7045, a mechanic's lien claimant is entitled to interest on his account where payment was refused upon demand made when it was due; and, under § 7267, a reasonable attorney fee may be allowed him in an action to foreclose his lien, and a tender by defendant in proceedings to foreclose the lien which does not provide for these items is not sufficient. *Chicago & S. E. Ry. Co. v. Woodard*, 159 Ind. 541 (65 N. E. Rep. 577).

Sec. 442. Enforcement of lien—Liability of mortgagee made a party, for costs. A mortgagee made a party to a proceeding to foreclose a mechanic's lien over which his mortgage has priority, in pursuance of a statute (R. I. Gen Laws, ch. 206, § 10) requiring him to be made a party, and who purchases the property at a sale thereunder for less than his mortgage debt, can not be required to pay any of the costs of the proceeding other than the expenses of the sale, under § 13, providing that costs shall in every instance be within the discretion of the court. *Jepherson v. Greene*, 24 R. I. 83 (52 Atl. Rep. 808). The court say: "As stated in this case (22 R. I. 276; 47 Atl. Rep. 599), the principal purpose of summoning the mortgagee is to enable a lienor to contest the mortgage, or to ascertain the amount due under it, so that the sale may be free from question as to prior incumbrances. But since he is made a party to the proceeding, what rule should be followed as to charging him with any portion of the costs? it is plain, as a general rule, that a prior security should not

be impaired, and that one should not be made liable for the costs of a suit which he has not instituted, and as to which he is in no default. The lienor, having notice of the mortgage by its record, has no cause to complain that it has priority in payment. The lien proceedings are subject to the mortgage. As stated in *Phil. Mech. Liens* (3d Ed.) § 67: 'Under a different rule it would be possible for a mortgagor to destroy the security by erecting costly improvements, the expense of which the estate improved could not be able to pay; and therefore the mortgagee is entitled to priority of payment over the lien of the mechanic for work done after notice of the existence of the prior lien, and the registry of the mortgage is such notice.' It does not always follow that security has been increased because work has been done. As lien proceedings are based upon statutory provisions differing in details, no rule in this matter is to be found, except in most general statement. Thus, in 13 *Enc. Pl. & Prac.* p. 1047, it is stated that, where the proceedings are equitable in nature, the costs are in the discretion of the court, unless regulated by statute. In *Close v. Hunt*, 8 Blackf. 254, it was held that, in lien cases, incumbrancers who were not in fault should not be taxed with costs. These principles give a fair rule. A prior mortgage, unimpeached, should keep its security intact, and should not be reduced by costs for which it is not equitably liable; but costs may be awarded against a mortgagee to the extent that they have been occasioned by his fault or for his benefit. The proceeding is to no advantage to the holder of an undisputed mortgage, but, rather, a hindrance; for without it he could sell at once upon default, whereas the suit may cause a delay of months. The work done upon the property may or may not add to its value. In this case the work done on the property covered by the mortgage was the building of a bank wall almost wholly for the benefit of the adjoining lot, owned by the mortgagor.

It is argued that the costs should come out of the proceeds of the sale, as the fund, as it does in some proceedings in equity. The fund to which the lien attaches is only the surplus over prior mortgages, and consequently the surplus only should be liable to costs."

Sec. 443. Miscellaneous notes. A mechanic's lien can not be enforced against a building erected by a town for a free public library. *Young v. Inhabitants of Falmouth*,

183 Mass. 80 (66 N. E. Rep. 419). The right of a materialman to a lien is governed by the law in force at the time of his making the contract under which the material was furnished. Ark. Laws 1899, p. 145, applied. *Choctaw & M. R. Co. v. Sullivan*, 70 Ark. 262 (68 S. W. Rep. 495). The right of one furnishing labor or material for the construction of a building to have a lien therefor is not affected by the fact that he is a nonresident of the state in which the building is located. *Genest v. Las Vegas Masonic Bldg. Ass'n*, N. Mex. (67 Pac. Rep. 743). A stipulation in a note taken by one having a mechanic's lien on property, payable after the time limited by law for the institution of proceedings to enforce the lien, that "a mechanic's lien is filed on this building to secure the payment of this note," operates merely to prevent a waiver of the lien and does not create an equitable mortgage or lien of any sort on the building. *Loyd v. Guthrie*, 131 Ala. 65 (31 So. Rep. 506).

MINES.

EPITOME OF CASES.

Sec. 444. Mining leases—Construction. The lessors in a coal mining lease conditioned that it should be void if the lessee failed to have commenced condemnation proceedings for a line of railroad to the leased land by a certain railroad company within a stated time, may have a cancellation of the lease where such condition is not complied with and it is out of the power of the lessee to comply with it. *Laurel Creek Coal & Coke Co. v. Browning*, 99 Va. 528 (39 S. E. Rep. 156). Where, by the terms of a lease of the right to work and use all the fine cutting stone on two tracts of land, the lessees are obliged to construct a railroad from the quarry over the land of a third party to a railroad, and there is no covenant for its conveyance to the lessors at the expiration of the lease, at that time such railroad becomes the property of the owners of the soil to which it is affixed and does not pass by a grant of the lessors. *Bedford-Bowling Green Stone Co. v. Oman*, Ky. (73 S. W. Rep. 1038; 24 Ky. Law Rep. 2274). A lessee

of coal in place for a definite term whose payments of royalty for such term, made in compliance with his obligation to pay a minimum royalty each year, aggregate more royalty than would have been required by the coal actually mined, can not set off such over payment against royalties due under a new lease afterward taken by him without going out of possession. *Denniston v. Haddock*, 200 Pa. St. 426 (50 Atl. Rep. 197). One taking an assignment from the lessees of a mining claim in which he agrees to "work said claim" and pay them a specific sum "out of the net proceeds of the said claim," who, after diligently working the same for several months at a loss, demonstrates its unproductiveness, does not, by subsequently assigning his interest in the lease to another who worked it for the remainder of the term without profit, become personally liable for the sum he agreed to pay for the first assignment. *Caley v. Portland*, Colo. App. (71 Pac. Rep. 892). A coal mining lease which provides that the mine shall be opened within one year from the date of the lease, and shall not be closed down for more than a year at a time; that the lessor shall receive 500 bushels of coal each year and a certain sum of money for each ton of coal mined, is enforceable by the lessor, and, therefore, not invalid for want of mutuality. *Ingle v. Bottoms*, 160 Ind. 73 (66 N. E. Rep. 160). For construction of particular conveyance of mining rights, see *Potter v. Rend*, 201 Pa. St. 318 (50 Atl. Rep. 821). For construction of particular mining leases, as to liability for royalties on failure to find ore, *Hewitt Iron Min. Co. v. Dessau Co.*, 129 Mich. 590 (89 N. W. Rep. 365); forfeiture for nonpayment of royalties, *Walnut Run Coal Co. v. Knight*, 201 Pa. St. 23 (50 Atl. Rep. 288); pounds in a ton of coal and right to screenings, *Johnston v. Westerman*, 201 Pa. St. 60 (50 Atl. Rep. 940); what constitutes an abandonment by lessee of a stone quarry, *Russell v. Stratton*, 201 Pa. St. 277 (50 Atl. Rep. 975); measure of damages for lessee's breach of lease, *Cleopatra Min. Co. v. Dickinson*, 28 Wash. 211 (68 Pac. Rep. 456).

Sec. 445. Conveyance of right to mine and remove all coal in a tract of land is not a sale. In the case of *Denniston v. Haddock*, 200 Pa. St. 426 (50 Atl. Rep. 197), the supreme court of Pennsylvania say: "It has been said in a number of cases that a conveyance of the right to mine and remove all the coal in a given tract of land is a sale of the coal in place, although the conveyance may be called a 'lease.'

The expression is unfortunate, for, while it may have produced no erroneous result in the cases where it is used, it tends to substitute the general rules appertaining to sales for the rules properly applicable to the particular contract that may be under consideration by the court. Thus, for example, in *Hope's Appeals*, 29 Wkly. Notes Cas. 365, which is practically the starting place of the error, the agreement, though called a 'lease,' was a purchase of the coal at a fixed price per acre, making a liquidated gross sum, which was payable absolutely in installments ending within 13 years, though the lessee had a nominal term of 99 years in which to remove the coal. It was justly said by the learned court below, whose decision was affirmed here, that it was 'manifest that the parties contemplated an actual sale of the coal, and not a lease, in the ordinary use of that word.' In *Sanderson v. City of Scranton*, 105 Pa. 469, the lease was expressly made 'perpetual until all the coal under the tract is mined'; and it was held that this was such a complete severance that the taxes of the city of Scranton on the coal in place were chargeable to the lessee, and not the lessor. So, in *Kingsley v. Iron Co.*, 144 Pa. 613 (23 Atl. Rep. 250), it was again held that there was such a severance that occupation of the surface was not an adverse possession, even against a lessee who had not opened up or entered on actual possession of the coal. With the decisions in these cases no fault can be found, but the expression that a conveyance of coal in place, even by a lease for a limited term is a sale, is inaccurate, as a general proposition of law, and unfortunate, from its tendency to mislead, which is apparent in some of the subsequent cases. Whether it would be better to call such an instrument accurately what it certainly was at common law, a 'lease without impeachment of waste,' or to endeavor to reconcile all the decisions by calling it a 'conditional sale,' is not necessary at present to discuss. The point to be noted is that the rules applicable to sales are not to be applied indiscriminately to such instruments, but each is to be construed, like any other contract, by its own terms."

Sec. 446. Mining leases—Right of lessee of coal mine to construct railroad switch on the leased premises. A mining lease granting to the lessee the right to enter upon the lands described for the purpose of mining coal, and of conducting and operating to any extent he may deem advisable, but not to hold possession of the land "for any other purpose,

except one acre, more or less, for operating the mines, and for dwellings," gives by implication the right to construct a railroad switch for the purpose of transporting the coal, and otherwise operating the mine; and an injunction will lie to prevent the lessor from interfering with the construction of such switch. *Ingle v. Bottoms*, 160 Ind. 73 (66 N. E. Rep. 160). The court say: "It is well settled that, when anything is granted, whatever is necessary or essential to the enjoyment of the grant is also granted. *Dand v. Kingscote*, 6 Mees. & W. 174; *Marvin v. Brewster*, 55 N. Y. 538 (14 Am. Rep. 322); *Rankin's Appeal*, 1 Monag. (Pa. Sup. Ct. Cas.) 308 (16 Atl. Rep. 82); 2 L. R. A. 429; *Wardell v. Watson*, 93 Mo. 107, 111 (5 S. W. Rep. 605); *Williams v. Gibson*, 84 Ala. 228 (4 So. Rep. 350; 5 Am. St. Rep. 371); *Bainbridge on Mines*, 101, 102; 20 Am. & Eng. Enc. Law (2d Ed.) 774. The rights which arise by implication under said rule are only such as are necessary to the enjoyment of the grant. *Pettingill v. Porter*, 8 Allen, 1 (85 Am. Dec. 671); *Barringer & Adams, Law of Mines & Mining*, 589. Under this rule the grant of the right to the coal carries with it as a necessary incident the right not only to penetrate the surface of the soil for the coal, but also to use such means and processes for mining and removing the same from the premises as may be reasonably necessary. This includes the right to construct such roads and railroad tracks on the surface of the land as are reasonably necessary for the transportation of supplies, machinery for the operation of the mine, and for removing the coal from the mine openings. 2 *Lindley on Mines*, § 813, and authorities cited *supra*. The question of how much of the surface is reasonably necessary for the proper operation of the mine is a question of fact, and not of law. It was said in *Pettingill v. Porter*, 8 Allen, 1 (85 Am. Dec. 671), concerning the meaning of the word 'necessary' when used in defining what rights passed by implication, that: 'The word "necessary" can not reasonably be held to be limited to absolute physical necessity. If it were so, the way in question would not pass with the land if another way could be made by any amount of labor and expense, or by any possibility. If, for example, the property conveyed were worth but one thousand dollars, it would follow from this construction that the plaintiff's intestate would not have the right of way over the triangular piece as appurtenant to the land, provided he could have made another way at an expense of one hundred thousand dollars. If the word

"necessary" is to have a more liberal and reasonable interpretation than this, the one adopted by the judge must be regarded as correct. Its effect was to require proof that the way over the triangular piece was reasonably necessary to the enjoyment of the dwelling house granted. See *Ewart v. Cochrane*, 7 Jur. (N. S.) 925; *Leonard v. Leonard*, 2 Allen, 543; *Carbrey v. Willis*, 7 Allen, 364 (83 Am. Dec. 688). Appellee insists, however, that appellant is, by the terms of said lease, restricted to the use of one acre, more or less, of said land, for the purpose of mining said coal, conducting and operating said mines. The lease grants to the lessee the right to enter 'upon the lands * * * for the purpose of mining coal and of conducting and operating to any extent he may deem advisable, but not to hold possession of said land for any other purpose, except one acre, more or less, for operating said mines, and for dwellings.' It will be observed that the limitation of the right to hold possession of the land to one acre, more or less, is a limitation for other purposes than those previously recited. It is true that the words 'for operating said mines,' which specify the use to be made of said one acre, more or less, designate a purpose expressly granted by the lease. This renders the meaning of said clause somewhat obscure. The rule is that a lease must be construed as a whole, and such construction placed upon it as will render all of its clauses harmonious, consistent, reasonable, and just, and mutually obligatory in its provisions. Exceptions are construed against the lessor and in favor of the lessee. 18 Am. & Eng. Enc. Law (2d Ed.) 617, 618, 624; 17 Am. & Eng. Enc. Law (2d Ed.) 4-8, 18; Gear, Land. & Tenant, § 68. Applying these rules to the lease in question, it is evident that the restriction of the possession for 'other purposes' to one acre, more or less, can not be held to limit the lessee's use of the surface for switches and roads to less than is reasonably necessary for the removal of the coal from said mines. To construe the reservation as controlling the entire lease, and limiting the right expressly granted, and those which would be necessarily implied, in order to effectuate the purposes of the grant, would, under the allegations of the complaint, be to practically destroy the lease, and prevent appellant from carrying out the true purpose of the same by mining all the coal under the land in a businesslike manner, and paying to appellant the royalty which would thereby come to him."

Sec. 447. Oil and gas leases. An oil lease for oil and gas purposes is a conveyance or sale of an interest in land, conditional and contingent on the discovery and reduction to possession of the oil or gas. *Lawson v. Kirchner*, 50 W. Va. 344 (40 S. E. Rep. 344). A contract by a landowner granting to another "all the oil and gas in and under" a certain tract of land, and providing penalties for delay in the drilling of the wells, creates an assignable interest in the land and must be in writing; and such interest can not be surrendered without a writing sufficient for the conveyance of real estate. *Heller v. Dailey*, 28 Ind. App. 555 (63 N. E. Rep. 490). Covenants of a gas and oil lease to pay rent and to furnish the lessor with gas to heat and light his dwelling on the premises, are covenants running with the land; and in an action against an assignee of the lease, an allegation that such assignee agreed to perform the covenants is not required. *Indiana Nat. Gas & Oil Co. v. Hinton*, 159 Ind. 398 (64 N. E. Rep. 224). A lessor in a lease of land for oil and gas purposes which reserves "land surrounding farm buildings, and marked by stakes, and as a protection against fire," can not mine oil upon the reservation. *Lynch v. Burford*, 201 Pa. St. 52 (50 Atl. Rep. 228). Where an oil and gas lease is made by one party to another covering two or more separate tracts of land, and is made to extend to the heirs and assigns of the parties, and different persons become the owners of such different tracts, each owner is entitled to the oil and gas produced on his tract, and to the royalty and rental arising from such tract. *Northwestern Ohio Nat. Gas. Co. v. Ullery*, 68 O. St. 259 (67 N. E. Rep. 494). When its terms will permit it under the rules of law, an oil lease will be so construed as to promote development and prevent delay and unproductiveness; and unless the terms of the lease give the lessee such right, he will not be permitted to hold the lease without operating under it, and thereby prevent the lessor from operating on the land or leasing it to others. See opinion for application of these principles to particular facts. *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583 (42 S. E. Rep. 655; 59 L. R. A. 566). A person who accepts an oil or gas lease, with a stipulation therein contained to pay a monthly rental until a well is completed, or until the expiration of a certain fixed term, is bound to pay such rental, although he does not, within such term, enter upon the land and complete such well, unless he was prevented from so doing by the plaintiffs, and not by mere personal de-

fault. *Lawson v. Kirchner*, 50 W. Va. 344 (40 S. E. Rep. 344). Where a lease granting the right to drill and operate for "petroleum oil or gas" provided that, if gas is obtained in sufficient quantities to utilize, the consideration therefor should be \$500 per annum for each well drilled on the premises, evidence is not admissible to show that the word "gas" as used in the lease in trade usage meant gas derived from a gas well, and not gas from an oil well. *Burton v. Forest Oil Co.*, 204 Pa. St. 349 (54 Atl. Rep. 266). A stipulation in an oil lease which required certain wells to be completed within stated times, that, "in case no well is completed within thirty days from this date, then this grant shall become null and void, unless second party shall pay to first party thirty dollars each and every month in advance while such completion is delayed," does not constitute a promise or obligation to pay rental, but gives the lessee an option to complete wells or pay rentals to keep the lease alive. *Van Etten v. Kelly*, 66 O. St. 605 (64 N. E. Rep. 560). A covenant by lessees in a gas and oil lease, executed July 25, 1889, to drill a well within twelve months or, on failure to do so, pay the lessor \$56 yearly as rent, and another covenant binding them to furnish gas to heat and light the dwellings on the premises demised on or before Nov. 15th, are somewhat inconsistent, but both are lawful, and a failure to drill a well upon the premises within the specified time does not excuse the lessees from performance of the covenant to furnish gas for the dwelling; and the owner and occupant of the premises may sue on the covenant to furnish gas, notwithstanding he has conveyed the land to another as security for a debt by deed covenanting that the grantee was "to have the proceeds accruing from said lease." *Indiana Nat. Gas & Oil Co. v. Hinton*, 159 Ind. 398 (64 N. E. Rep. 224). A gas lease giving the lessees the right "to remove any buildings, machinery or fixtures placed on said premises by them," in which it is also stipulated that in case of their abandonment of the lease while there was a well on the premises furnishing gas sufficient for the lessor's residence, it should be left in condition for such use, does not authorize the lessees, in case of their abandonment of the lease under such circumstances, to remove the drive pipe, casing and tubing from the well. *Ohio Oil Co. v. Greist*, 30 Ind. App. 84 (65 N. E. Rep. 534).

For construction of particular gas and oil leases, as to what constitutes an abandonment, *Calhoun v. Neely*, 201 Pa. St. 97 (50 Atl. Rep. 967); measure of damages for lessee's viola-

tion of contract to test gas well for oil before abandoning it, *McClay v. Western Pennsylvania Gas Co.*, 201 Pa. St. 197 (50 Atl. Rep. 978); agreement for reduction of rental, *Hunter v. Apollo Oil & Gas Co.*, 204 Pa. St. 385 (54 Atl. Rep. 274); ~~consideration~~, termination and surrender, *Brown v. Fowler*, 65 O. St. 507 (63 N. E. Rep. 76); as to when rentals are due, *Doxey's Estate v. Service*, 30 Ind. App. 174 (65 N. E. Rep. 757); termination of lease, *American Window Glass Co. v. Williams*, 30 Ind. App. 685 (66 N. E. Rep. 912); right to cancel lease, *Coffinberry v. Sun Oil Co.*, 68 O. St. 488 (67 N. E. Rep. 1069); forfeiture for nonpayment of rent and equitable relief therefrom, *Edwards v. Iola Gas Co.*, 65 Kan. 362 (69 Pac. Rep. 350).

Sec. 448. Oil and gas leases—Implied condition subsequent to develop property—Forfeiture. Where a contract for a nominal consideration by the owners of land, giving another the right to enter thereon and construct gas or oil wells, reserves to them one-sixth of all oil produced and saved from said premises and stipulates, in case gas only is found, that the lessee shall pay them \$100 rent for the product of each well "if such product was being used off the premises, and the free use of gas needed by the owners for domestic purposes," the whole contract to become void if no well was completed in 40 days, unless the grantee thereafter pay \$1 a day until its completion, it is held that there is an implied condition subsequent to develop the property, so that the lessor may enforce a forfeiture in equity upon the lessee's closing up a well constructed by him in which gas was found in paying quantities and apparently abandoning it for two years. *Gadbury v. Ohio & I. Consol. Nat. & Ill. Gas Co.*, 162 Ind. 9 (67 N. E. Rep. 259; 62 L. R. A. 895). The court say: "In an ordinary agricultural lease, where the rent is payable in kind, it would, of course, be implied that the tenant would farm the land; and the requirement is implied that lessees in mineral leases, upon royalties, will develop the property, if exploration warrants it, where the minerals are stable, although the only result of a delay in operating would be to postpone the receipt of profits or royalties. *Island Coal Co. v. Combs*, 152 Ind. 379 (53 N. E. Rep. 452); *McKnight v. Natural Gas Co.*, 146 Pa. 185 (23 Atl. Rep. 164; 28 Am. St. Rep. 790). If a duty to operate is to be implied in such cases, there is much more reason for the implication in a grant of the right to operate

for oil and gas upon a ~~royalty~~, owing to the migratory habit of the fluids. 'Oil leases,' it ~~was declared in~~ *McKnight v. Natural Gas Co.*, 146 Pa. 185 (23 Atl. Rep. 164; 28 Am. St. Rep. 790), 'must be construed with reference to the known characteristics of the business.' As said in another Pennsylvania case: 'The nature of oil and gas, the pressure of the superincumbent rocks, and the vagrant habits of both fluids under the influence of this pressure, enter into the contemplation of both parties to such an arrangement'. *Kleppner v. Lemon*, 176 Pa. 502 (35 Atl. Rep. 109). In grants of the character in question, the title is inchoate, and for the purpose of exploration only, until oil or gas is found in quantities warranting operation; and while the courts manifest a disposition to protect the grantee at this stage, by treating his interest as no longer postponed to the happening of a condition precedent, yet it is thoroughly settled that he can not omit to develop the property and hold the grant for speculative purposes purely. *Parish Fork Oil Co. v. Bridgwater Gas Co.*, 51 W. Va. 583 (42 S. E. Rep. 655; 59 L. R. A. 566); *Blue-stone Coal Co. v. Bell*, 38 W. Va. 297 (18 S. E. Rep. 493); *Guffy v. Hukill*, 34 W. Va. 49 (11 S. E. Rep. 754; 8 L. R. A. 759; 26 Am. St. Rep. 901); *Ray. v. Natural Gas Co.*, 138 Pa. 576 (20 Atl. Rep. 1065; 12 L. R. A. 290; 21 Am. St. Rep. 922); *Venture Oil Co. v. Fretts*, 152 Pa. 451 (25 Atl. Rep. 732); *Kleppner v. Lemon*, 176 Pa. 502 (35 Atl. Rep. 109); *Huggins v. Daley*, 40 C. C. A. 12 (99 Fed. Rep. 606; 48 L. R. A. 320); *Federal Oil Co. v. Western Oil Co.*, (C. C.) 112 Fed. Rep. 373; *Hawkins v. Pepper*, 117 N. C. 407 (23 S. E. Rep. 434).

The duty to develop the property upon the discovery of oil or gas in paying quantities is not to be regarded as a mere implied covenant, but, in a case like this, where practically the whole consideration must depend upon the implied undertaking, is to be treated as a condition subsequent. Conditions subsequent are not ordinarily favored, 'because,' as declared by Prof. Kent, 'they tend to destroy estates, and the rigorous exaction of them is a species of summum jus, and in many cases hardly reconcilable with conscience.' 4 Kent's Comm. p. *129. Accordingly, it has been declared in unrestricted terms that equity will not lend its aid to enforce a forfeiture. Where there has been a cause of forfeiture, followed by an entry upon the part of the grantor, so that the title has been lost, it is not strictly the enforcing of a forfeiture for a court of equity to

decree a cancellation of the instrument. *McClellan v. Coffin*, 93 Ind. 456; *Birmingham v. Lesan*, 77 Me. 494 (1 Atl. Rep. 151). But even in a case of this kind, where the circumstances do not permit of an entry, the forfeiture may be, in effect, enforced by suit in equity. Forfeitures are usually against conscience and without equity, and it is for these reasons that courts of chancery ordinarily refuse relief in such cases, but an exception to the rule must exist where it be against equity to permit the defendant to longer assert his title. *Leach v. Leach*, 4 Ind. 628 (58 Am. Dec. 642); *McClellan v. Coffin*, 93 Ind. 456; *Richter v. Richter*, 111 Ind. 456 (12 N. E. Rep. 698). In the last case cited a stipulation was treated as a condition subsequent, rather than a covenant, and the grantor's title quieted, because of the lack of another remedy. In the case in hand specific performance could not be enforced—*Louisville, etc. R. Co., v. Bodenschatz*, 141 Ind. 251 (39 N. E. Rep. 703);—and the completion of the first well having cut off the liquidated damages of \$1 per day for noncompletion and as no gas has been disposed of off the premises, there remains no measure of damages, for, while the damages would be substantial, they would be speculative. *Foster v. Elk Fork, etc., Co.*, 32 C. C. A. 560 (90 Fed. Rep. 178); *Federal Oil Co. v. Western Oil Co.*, (C. C.) 112 Fed. Rep. 373. The lack of any other remedy, and the danger that the gas might be withdrawn through wells on other lands, makes a case of this kind appeal to the conscience of the chancellor, and calls upon him to enforce the incurred forfeiture by removing the cloud from the title. In *Monroe v. Armstrong*, 96 Pa. 307, it was said concerning a gas and oil lease. 'Forfeiture for nondevelopment or delay is essential to private and public interest in relation to the use and alienation of property. In such cases as this, equity follows the law. In general, equity abhors a forfeiture, but not when it works equity and protects a landowner from the laches of a lessee whose lease is of no value till developed.'

The next question that arises is whether the paragraph of complaint in question sufficiently shows that the interest conveyed by appellants to said grantee Andrews has been forfeited. An estate is not per se forfeited by the breach of a condition subsequent. *Cross v. Carson*, 8 Blackf. 138 (44 Am. Dec. 743); *Thompson v. Thompson*, 9 Ind. 323 (68 Am. Dec. 638). It was a rule of the common law that, where an estate commenced by livery, it could not be determined before

entry. 4 Kent's Comm. p. *128. In Indiana a demand for possession, based on the breach, followed by a refusal, is equivalent to an entry on the premises. *Clark v. Holton*, 57 Ind. 564; *Indianapolis, etc., R. Co. v. Hood*, 66 Ind. 580; *Cory v. Cory*, 86 Ind. 567; *Preston v. Bosworth*, 153 Ind. 458 (55 N. E. Rep. 224; 74 Am. St. Rep. 313). Without determining whether this rule as to an entry should be applied to the grant of an easement or of a chattel interest—*Roberts v. Davey*, 1 Nev. & Man. 443,—or whether it is enough for the grantor in such case to evince unequivocally his election, we think that it may be affirmed in this case that the forfeiture is sufficiently shown. Here the grant did not dispossess the appellants, and they could not enter upon themselves; and, besides, the failure for so long a time, without apparent excuse, to develop the property, prima facie authorized appellants, without demand, to treat the grant as abandoned. See *Richter v. Richter*, 111 Ind. 456 (12 N. E. Rep. 698); *Cree v. Sherfy*, 138 Ind. 354 (37 N. E. Rep. 787); *Island Coal Co. v. Combs*, 152 Ind. 379 (53 N. E. Rep. 452); *Huggins v. Daley*, 40 C. C. A. 12 (99 Fed. Rep. 608; 48 L. R. A. 320); *Guffy v. Hukill*, 34 W. Va. 49 (11 S. E. Rep. 754; 8 L. R. A. 759; 26 Am. St. Rep. 901). As to election by suit, see *Carnahan v. Tousey*, 93 Ind. 561."

Sec. 449. Rights of life tenant in mines. A life tenant has no interest in, and no right to open and work, unopened mines. *Bond v. Godsey*, 99 Va. 564 (39 S. E. Rep. 216). A widow having a life estate in farm lands, who joins the remainderman in leasing a part of the farm for a stone quarry not previously opened, has no right therein and can not object to its operation. *Maher's Adm'r v. Maher*, 73 Vt. 243 (50 Atl. Rep. 1063). The court say: "If the widow might have objected to the quarrying as an interference with her use of the land as a farm, she waived her right by joining in the lease. Further than her right to prevent such interference she had none in the quarry, for it had not been opened, except to keep it unwasted for the remainderman. *Lenfers v. Hente*, 73 Ill. 405 (24 Am. Rep. 263); *Allen v. De Groodt*, 98 Mo. 159 (11 S. W. Rep. 240; 14 Am. St. Rep. 628, note); *Marshall v. Mellon*, 179 Pa. 371 (36 Atl. Rep. 201; 35 L. R. A. 816; 57 Am. St. Rep. 601); *Billings v. Taylor*, 10 Pick, 460 (20 Am. Dec. 533). See, also, 17 Eng. Ruling Cas. pp. 723-724, for cases and notes."

Sec. 450. Rights of life tenant in mines—Rights of devisee of life estate to royalties accruing under oil lease made by testator. Royalties from oil wells accruing under a lease made by a testator in his lifetime pass to his devisee of a life estate in the land, although part of the wells were opened after the life estate accrued. *Andrews v. Andrews*, 31 Ind. App. 189 (67 N. E. Rep. 461). The court say: "A tenant for life, being entitled to the profit of the land, is entitled to the royalties from the wells that were opened and in operation when the life estate commenced. *Westmoreland Co.'s Appeal*, 85 Pa. 473; *Sayers v. Hoskinson*, 110 Pa. 473 (1 Atl. Rep. 308); *Koen v. Bartlett*, 41 W. Va. 559 (23 S. E. Rep. 664; 31 L. R. A. 128; 56 Am. St. Rep. 884); *Lynn's Appeal*, 31 Pa. 44 (72 Am. Dec. 721); *Freer v. Stotenbur*, 36 Barb. 641; *Bryan, Petroleum & Nat. Gas*, 41 et seq.; *Rogers, Mines and Quarries*, 257; *Gaines v. Mining Co.*, 33 N. J. Eq. 603; *Moore v. Rollins*, 45 Me. 493; *Clift v. Clift*, 87 Tenn. 17. (9 S. W. Rep. 360); *Lenfers v. Henke*, 73 Ill. 405 (24 Am. Rep. 263); *Crouch v. Puryear*, 1 Rand. 258 (10 Am. Dec. 528); *Barringer & Adams, Mines and Mining*, 8; *Hendrix v. McBeth*, 61 Ind. 473 (28 Am. Rep. 680). In *Hendrix v. McBeth*, supra, a decedent in his lifetime leased certain lands for mining coal, and the lessee sunk a shaft, and began the mining of coal. At his death, testate, his widow took, under the statute, one-third of the land for life. The executor, empowered to collect the rents and profits of the land for certain purposes, had received two-thirds of the royalties, and sued the lessees and widow for the remaining one-third. It was held that the widow was entitled to the one-third of the royalties. And it is the general common-law rule that, where there have been no operations for oil commenced on the land before the estate for life accrued, the life tenant has no right to operate for oil, nor can he give such a right to any lessee from him. *Stoughton's Appeal*, 88 Pa. 198; *Westmoreland Co.'s Appeal*, 85 Pa. 473; *Blakely v. Marshall*, 174 Pa. 425 (34 Atl. Rep. 564); *Marshall v. Mellon*, 179 Pa. 371 (36 Atl. Rep. 201; 35 L. R. A. 816; 57 Am. St. Rep. 601). Appellant's counsel rely chiefly upon the two cases last cited. In neither of these cases had there been any operations for oil prior to the beginning of the life estate. In *Blakely v. Marshall*, the lease was made by lessors who were life tenants, and also as trustees for those in remainder; that is, all the interests concurred in making the lease. It was held that the life tenants were entitled to the

interest on the proceeds from royalties during their joint lives and the life of the survivor, and that at the death of the latter the principal was payable to the remaindermen. In *Marshall v. Mellon* this doctrine was approved, and it was held that the life tenant could not enforce the terms of a lease executed by him for gas and oil purposes. While a tenant for life, subject to waste, can not open a new mine, yet he may open the earth in new places to reach a mine which has been worked before the beginning of the life estate. Sinking a new pit on the same vein is not necessarily the opening of a new mine. *Clavering v. Clavering*, 2 P. Wms. 388; *Bagot v. Bagot*, 32 Beav. 509; *Elias v. Griffith*, L. R. 4 App. Cas. 465. The reason underlying this doctrine is that where the owner of the fee in his lifetime has opened and worked a mine, he has made it a part of the profits of the land. *Viner v. Vaughan*, 2 Beav. 466. However, it seems to be immaterial whether the mine opened by the owner of the fee produced a profit or not. If the owner of the fee in his lifetime has opened the mine, even though he may have discontinued working upon it for a number of years prior to his death, the life tenant has a right to use the mine for his own profit. *Elias v. Griffith*, 8 Ch. Div. 521. But the distinction is recognized between the discontinued working of a mine consisting of a mere cessation of work, and an abandonment with an executed intention to devote the land to some other use. In the former case the life tenant's right to operate the mine is not defeated, while in the latter case it is. *Barringer & Adams, Mines and Mining*, 8, and cases cited. In *Billings v. Taylor*, 10 Pick. 460 (20 Am. Dec. 533), the court said: 'Whatever doubts may have been formerly entertained, it seems now to be well settled that a widow is entitled to dower in such mines and quarries as were actually opened and used during the lifetime of the husband; and it makes no difference whether the husband continued to work them to the period of his death, or whether they have been continued since his death by the heir or his assignee.' And in *Neel v. Neel*, 19 Pa. 323, it is said: 'It seems in this case that the author of the gift had sometimes sold coal out of the pits, but I do not conceive this to be material. It is sufficient that he opened them, and derived any profit from them, even if it were only private. And the decisions refer to coal mines, iron mines, etc., and the tenant for life may work them, even though the working of them may have been discontinued before the death of him through whom the estate comes, and,

if necessary to the proper working of them, to make new openings in the ground.' See, also, *Coates v. Cheever*, 1 Cow. 460. In the case at bar the lease was executed before the beginning of the life estate, and gave the lessee the right to operate for oil upon the land, and to take all the oil found, upon the payment of a certain royalty. If a well was not commenced within a certain time, the lease was void, unless the lessee should pay a certain annual sum during the delay. The instrument was not acknowledged, and from its whole tenor does not attempt to do more than lease the lands for gas and oil purposes. The validity of the lease and the lessee's right to operate wells are not questioned. The lease is valid and was in force at the beginning of the life estate, and under this provision the lessee may open and operate such wells as he chooses. If no wells had been drilled, and the lessees had paid the stipulated annual rental to the testator up to the time of his death we think it clear that this rental would be payable to the life tenant during the delay in beginning operations. And if the whole territory had been developed and the wells in operation under the lease prior to the time the life estate accrued, the royalty, as we have seen, would be payable to the life tenant. The life tenant's right to the rents and profits from open wells rests upon the lawfulness of the severance and conversion of the oil into personalty under the lease. Although the additional wells had not been drilled, yet the right to drill them existed at the beginning of the life estate. The life tenant has not attempted to grant any new right. The additional wells are not opened by any authority from her. They may be opened by virtue of the lease without reference to her wishes in the matter. The opening of new wells under the lease is practically the act of the testator. He authorized the act by the lease, and in contemplation of law the wells may be treated as already opened when the life estate accrued. In *Koen v. Bartlett*, 41 W. Va. 559 (23 S. E. Rep. 664; 31 L. R. A. 128; 56 Am. St. Rep. 884), the court said: 'A mine lawfully leased to be opened is an open mine, within the reason of the rule as laid down in these cases; and when lawfully opened and worked, as in this case, during the time that the freehold estate of the life tenant continues, the profits issuing therefrom, thus lawfully severed and produced, belong of right to him; for the term "profit" in law comprehends the produce of the soil, whether it arises above or below the surface, including product of mines, as well as the herbage growing on

the surface.' To the same effect is *Priddy v. Griffith*, 150 Ill. 560 (37 N. E. Rep. 1004; 41 Am. St. Rep. 375)."

Sec. 451. Separate ownership of surface and mineral estate. A reservation in a grant of land of the right of mining beneath the surface, for which purpose tunnels, drifts, or excavations may be made, will not relieve the grantor from the duty of leaving sufficient support for the surface; and the right to sue for a violation of this duty passes to the surface owner who is in possession when the subsidence occurs, without regard to the date of his conveyance, but the statute of limitations begins to run against the action from the time of the removal of the support, and not that of the resulting subsidence. The measure of damages is the actual loss sustained to the surface owner's land, including injury to his buildings, and not the difference in the market value before and after the injury. *Noonan v. Pardee*, 200 Pa. St. 474 (50 Atl. Rep. 255; 55 L. R. A. 410; 86 Am. St. Rep. 722). See, on the subject of this section, *Hosack v. Crill*, 204 Pa. St. 97 (53 Atl. Rep. 640).

MORTGAGES.

EPITOME OF CASES.

Sec. 452. What constitutes a valid mortgage. A mortgage is nullified by the subsequent vacation or reversal in the due course of litigation of a judgment on which the mortgagor's title rested. *Mach v. Blanchard*, 15 S. Dak. 432 (90 N. W. Rep. 1042; 91 Am. St. Rep. 698). A note and mortgage given by the heirs of a deceased mortgagor to his mortgagee who has filed the original mortgage debt as a claim against the mortgagor's estate, for the renewal of the loan, is based on a sufficient consideration, although the old note was not delivered up and cancelled of record. *Humboldt Sav. & L. Soc. v. Dowd*, 137 Cal. 408 (70 Pac. Rep. 274). Where a town has no authority to grant a license to sell intoxicating liquors, except upon the previous payment of a stipulated license fee, a note and mortgage given

for such fee on account of a license issued without such previous payment, are without consideration, the license being void. *Ristine v. Clements*, 31 Ind. App. 338 (66 N. E. Rep. 924). The fact that the attorney of a mortgagee drew up the mortgage and superintended its execution, and that it contained a stipulation for the payment of attorney's fees, does not disqualify such attorney as a witness to the mortgagor's signature. *Chastain v. Porter*, 130 Ala. 410 (30 So. Rep. 492; 89 Am. St. Rep. 17). The fact that a mortgage was taken in the name of a nonresident agent of the real owner of the same, and after being recorded was assigned by the agent to the owner and the assignment withheld by him from record, all for the fraudulent purpose of avoiding taxation in the name of such owner, does not render the mortgage void on the ground of public policy. *Callicott v. Allen*, 31 Ind. App. 561 (67 N. E. Rep. 196). The court disapproves *Drexler v. Tyrrell*, 15 Nev. 114; and *Sheldon v. Pruessner*, 52 Kan. 579 (35 Pac. Rep. 204; 22 L. R. A. 709), and cites to the contrary *Crowns v. Forest Land Co.*, 99 Wis. 103 (74 N. W. Rep. 546); *Nichols v. Weed Sewing Machine Co.*, 27 Hun, 200, affirmed in 97 N. Y. 650, and *Jones on Mortgages*, § 619. *Ida. Rev. Stat.*, § 3385, prohibits the mortgaging of real estate by a chattel mortgage. *Beeler v. C. C. Mercantile Co.*, *Ida.* (70 Pac. Rep. 943; 60 L. R. A. 283).

Sec. 453. Alteration of mortgage—Insertion of "gold" clause. The unauthorized insertion of the word "gold" before the word "dollars" in a mortgage, after its execution and delivery, is a material alteration, where at the time the mortgage was made the debt secured could have been paid in other currency. *Foxworthy v. Colby*, 64 Neb. 216 (89 N. W. Rep. 800; 62 L. R. A. 393). The court say: "It is contended by plaintiff that the alteration of the instruments by the insertion of the word 'gold' is an immaterial alteration. We can not assent to this. A material alteration of an instrument is any alteration which causes it to speak a language different in legal effect from that which it originally spoke. *Bridges v. Winters*, 42 Miss. 135 (97 Am. Dec. 443; 2 Am. Rep. 598); *Murray v. Klinzing*, 64 Conn. 78 (29 Atl. Rep. 244); *Wheelock v. Freeman*, 13 Pick. 168 (23 Am. Dec. 674); *Oliver v. Hawley*, 5 Neb. 439; *Fisherdict v. Hutton*, 44 Neb. 122 (62 N. W. Rep. 488). By the terms of the contract as it was originally made, it could have been satisfied and discharged

by the payment of the sum named in any currency which was lawful money at the time of the payment. The contract, as modified, could only be discharged by the payment of a specific kind of money. The defendant was by this change deprived of a legal privilege which she enjoyed under the contract she had made. By this alteration the legal effect of her contract was changed."

Sec. 454. Equitable mortgage—Mortgage by deposit of title papers. An agreement by one to give a mortgage on his undivided interest in the real estate of his father to indemnify his surety may be enforced as an equitable mortgage by the latter to the extent he has been compelled to pay as such surety. *Wickes v. Hynson*, 95 Me. 511 (52 Atl. Rep. 747). Where an assignee of a mortgage, who has purchased the mortgaged property at foreclosure sale under a power in the mortgage and received an auctioneer's certificate of sale, indorses and delivers such certificate and the original note and mortgage to a third party as security for a loan, the transaction creates an enforceable equitable mortgage. *Woodruff v. Adair*, 131 Ala. 530 (32 So. Rep. 515). A stipulation in a farm lease that "all the crops raised on said farm the coming season" should be the lessor's and remain his property until the rent was fully paid, amounts to an equitable mortgage; the legal title remains in the tenant, and his subsequent mortgage to another of crops afterward grown on the land recorded before the equitable mortgage is superior to it. *Kelly v. Goodwin*, 95 Me. 538 (50 Atl. Rep. 711). The mere deposit of a bare muniment of title to land as security for a loan does not put title thereto in the lender, or create a lien in his favor on such land. *Atlanta Trust & Banking Co. v. Nelms*, 115 Ga. 53 (41 S. E. Rep. 247).

Sec.

Sec. 455. Fraud or duress in procuring mortgage. A petition to cancel a mortgage for duress is insufficient where it shows that the plaintiff owes the debt secured by the mortgage and makes no offer to pay it. *Fry v. Piersol*, 166 Mo. 429 (66 S. W. Rep. 171). A judgment debtor, who, in order to prevent his judgment creditor from carrying out his threat to have an execution sale of his property thereunder, agrees with him to a settlement and afterward executed a mortgage for the amount agreed upon, can not avoid the mortgage for duress. *Dispeau v. First Nat. Bank*, 24 R. I. 508 (53 Atl. Rep. 868).

For particular fact cases illustrating when a mortgage or deed of trust will be set aside on account of its execution having been procured through undue influence or duress, see *Thorp v. Smith*, 63 N. J. Eq. 70 (51 Atl. Rep. 437); *Bogue v. Franks*, 199 Ill. 411 (65 N. E. Rep. 346); *Mortimer v. McMullen*, 202 Ill. 413 (67 N. E. Rep. 20); *Turner v. Overall*, 172 Mo. 271 (72 S. W. Rep. 644).

Sec. 456. Construction of mortgages. A mortgage of land directed by will to be sold and the proceeds divided, by a devisee under such will, does not create a lien upon the land, but operates merely as an assignment of such devisee's interest. *Walker v. Killian*, 62 S. C. 482 (40 S. E. Rep. 887). A mortgage of an unoccupied upland lot "together with, all and singular, the appurtenances thereunto, now or hereafter belonging," does not pass as an appurtenance adjacent tide lands owned by the state of which the mortgagor had possession and a preference right to purchase, and on which he had constructed a wharf and a building which, by mistake, extended a few inches onto the upland. *Kuhl v. Lightle*, 29 Wash. 137 (69 Pac. Rep. 630).

Sec. 457. Title of parties and right to possession. In Ohio, as between the mortgagor and the mortgagee in a mortgage upon real estate, after condition broken, the legal title to the mortgaged premises is in the mortgagee, and he may elect either to sue for foreclosure and sale, or bring ejectment to recover possession of the premises. *Bradfield v. Hale*, 67 O. St. 316 (65 N. E. Rep. 1008). A provision in a mortgage that in case of a default in the payment of the debt thereby secured, the mortgagee shall be entitled to the immediate possession of the premises, is valid as to the parties and subsequent purchasers and incumbrancers chargeable with notice. *Felino v. K. S. Newcomb Lum. Co.*, 64 Neb. 335 (89 N. W. Rep. 755). In Vermont a mortgagee may maintain trover for wood or timber cut upon the mortgaged premises after condition broken, and converted. *Jeffers v. Pease*, 74 Vt. 215 (52 Atl. Rep. 422). In Kansas it is the legal right of a mortgagor to retain possession of the mortgaged premises until a valid decree foreclosing his equity of redemption is entered, a valid sale made, and deed issued thereunder; but this legal right may be waived or surrendered by consent or agreement of parties, either express or implied. Thus, when a mortgagor

surrenders possession of the premises to a purchaser at a void foreclosure sale, who enters under the rights which he supposed he acquired at the sale, believing himself to be the owner of the premises, the mortgagor will be deemed to have waived his legal right to retain possession, and to have assented to the possession thus taken, and the purchaser will thence forth be deemed "a mortgagee in possession," and entitled to all the rights of such. *Kelso v. Norton*, 65 Kan. 778 (70 Pac. Rep. 896; 93 Am. St. Rep. 308). In Kentucky a mortgage is regarded as a mere security, and both at law and in equity the mortgagor is the real owner of the property mortgaged; and a mortgagee has no lien upon the rents of the property unless he has in the mortgage stipulated for a specific pledge of them as part of his security, nor is he entitled to the insurance which may be collected by the mortgagor upon the buildings upon the property unless the mortgage expressly stipulated that it shall be for his benefit. *Guill's Adm'r v. Corinth Deposit Bank*, (Ky.) 68 S. W. Rep. 870 (24 Ky. Law Rep. 482). The rights of a grantee acquiring possession under an absolute deed intended as a mortgage are the same as those of a mortgagee in possession. *Richter v. Noll*, 128 Ala. 198 (30 So. Rep. 740).

Sec. 458. Mortgagee in possession—Ejectment against before debt is paid. Although a mortgage is a mere lien, a mortgagee who has obtained possession of the mortgaged premises in accordance with its terms, and with the knowledge and acquiescence of the mortgagor, can not be ejected by him until the mortgage debt is paid. *Finlayson v. Peterson*, 11 N. Dak. 45 (89 N. W. Rep. 855). Citing numerous authorities. In Kansas, where both legal and equitable defenses are available in an action of ejectment, it is held that an action for the recovery of real property, in the nature of ejectment, by the heirs at law of a deceased mortgagor, will not lie against a mortgagee in possession, the mortgage debt remaining unpaid, although at the time of the commencement of such action a foreclosure of the mortgage would be barred by the statute of limitations; but their remedy is by an action to redeem. *Kelso v. Norton*, 65 Kan. 778 (70 Pac. Rep. 896; 93 Am. St. Rep. 308). The court say: "In the case of *Spect v. Spect*, 88 Cal. 437 (26 Pac. Rep. 203; 13 L. R. A. 137; 22 Am. St. Rep. 314), it is held: 'A mortgagor who has placed his mortgagee in possession of the mortgaged premises can not maintain ejectment against him while the debt for which the mort-

gage was given remains unsatisfied, even though an action by the mortgagee for the recovery of the debt is barred by the statute of limitations.' In the opinion it is said: 'Whenever a mortgagor seeks a remedy against his mortgagee which appears to the court to be inequitable, whether it be to cancel the mortgage as a cloud upon his title, or to enjoin a sale under the power given by the security, or to recover from the mortgagee the possession of the mortgaged premises, the court will deny him the relief he seeks, except upon the condition that he shall do that which is consonant with equity. In accordance with these principles, it is a settled rule that a mortgagor can not maintain ejectment against his mortgagee until the debt is paid. *Phyfe v. Riley*, 15 Wend. 248 (30 Am. Dec. 55); *Hubbell v. Moulson*, 53 N. Y. 225 (13 Am. Rep. 519); *Fee v. Swingly*, 6 Mont. 596 (13 Pac. Rep. 375); *Roberts v. Sutherlin*, 4 Or. 220; *Cooke v. Cooper*, 18 Or. 142 (22 Pac. Rep. 945; 7 L. R. A. 273; 17 Am. St. Rep. 709); *Frink v. Le Roy*, 49 Cal. 314; *Tallman v. Ely*, 6 Wis. 244; *Brinkman v. Jones*, 44 Wis. 512; *Sahler v. Signer*, 44 Barb. 614; *Madison Ave. Baptist Church v. Oliver St. Church*, 73 N. Y. 82; *Wright v. Wright*, 7 N. J. Law, 175 (11 Am. Dec. 546); *Wells v. Van Dyke*, 109 Pa. 335; *Duke v. Reed*, 64 Tex. 705; *Jones, Mortg.* § 715. The debt is not satisfied or paid by mere lapse of time. The statute of limitations is a bar to the remedy only, and does not extinguish or even impair the obligation of the debtor. It is available in judicial proceedings only as a defense, and can never be asserted as a cause of action in his behalf, or for conferring upon him a right of action. It is to be used as a shield, and not as a sword.' In the case of *Bryan v. Brasius*,

Ariz. (31 Pac. Rep. 519), Gooding, C. J., in rendering the opinion, says: 'But it is claimed by appellant that the debt secured by the mortgage was barred by the statute of limitations at the commencement of this action, and therefore need not be paid. I do not think a court of equity would ever allow the statute to have that effect. It would be so inequitable and shocking to all sense of right that a court exercising equitable powers, as this court does and recognizing equitable defenses, in an action of ejectment, would never disturb the possession of a mortgagee in peaceable and quiet enjoyment under legal proceedings, valid or invalid, until the mortgage debt was paid and all other requirements of equity fully met.' The above cases arose in states in which the mortgage was of similar effect as in our own. Of like import, see

Newell, Ej. 11; 3 Pom. Eq. Jur. § 1189. *Hildreth v. James*, 109 Cal. 299 (41 Pac. Rep. 1038); *Van Duyne v. Thayre*, 14 Wend. 234; *Pfyfe v. Riley*, 15 Wend. 248 (30 Am. Dec. 55); *Miner v. Beekman*, 50 N. Y. 337; *Fee v. Swingly*, 6 Mont. 596 (13 Pac. Rep. 375); *Johnson v. Sandhoff*, 30 Minn. 197 (14 N. W. Rep. 889); *Stark v. Brown*, 12 Wis. 572 (78 Am. Dec. 762); *Wright v. Wright*, 2 Halst. 175 (11 Am. Dec. 546); *Duke v. Reed*, 64 Tex. 705. In no jurisdiction where equitable defenses may be interposed to an action in the nature of ejectment for the recovery of real property do we find a different holding. Whether the mortgage there operates, as at common law, to convey a defeasible title, or as a mere security contract incident to the debt, does not change the rule. In neither case will the mortgagor, or one claiming under him by conveyance subsequent to the mortgage or by operation of law, be permitted to maintain ejectment against one shown to be a mortgagee in possession of the premises, whether at the time the action is brought to recover possession the statute of limitations would or would not bar an action by the mortgagee to foreclose his mortgage. Not only is this the law in other jurisdictions having similar statutory provisions with relation to the legal effect of mortgages and the defenses which may be interposed in actions of ejectment, but it so accords with that which is just, right and equitable between the parties in this and all other cases where some technical defect in legal proceedings is relied upon to obtain a nullification of such proceedings, and the acts and acquiescence of the parties therein for many years, that the rule commends itself to our judgment as sound and wholesome."

Sec. 459. Ejectment by mortgagor against party taking possession under color of void foreclosure proceedings. Construing and applying N. Dak. Rev. Codes, § 4714, providing that "a mortgage does not entitle the mortgagee to possession of the property, unless authorized by the express terms of the mortgage; but after the execution of the mortgage the mortgagor may agree to such change of possession without a new consideration," it is held that a mortgagor may maintain ejectment against one taking possession of the mortgaged premises without his consent, either express or implied, under color of proceedings foreclosing the mortgage by advertisement which were illegal and void. *McClory v. Ricks*, 11 N. Dak. 38 (88 N. W. Rep. 1042). The court say: "It is clear that

this statute in terms precludes a mortgagee from taking possession of the land before foreclosure under the mortgage unless a clause inserted in the mortgage expressly permits him to do so. Similar statutes are found in many of the states, and adjudications under such statutes are numerous and uniformly to the effect that the mortgage itself confers no right of possession either before or after default. *Hall v. Savill*, 3 G. Greene, 37 (54 Am. Dec. 485); *Wagar v. Stone*, 36 Mich. 364; *Kopke v. People*, 43 Mich. 45 (4 N. W. Rep. 551); *Morse v. Byam*, 55 Mich. 594 (22 N. W. Rep. 54); *Rice v. Railroad Co.*, 24 Minn. 464; *Newton v. McKay*, 30 Mich. 380; *Humphrey v. Hurd*, 29 Mich. 44; *Hazeltine v. Granger*, 44 Mich. 503 (7 N. W. Rep. 74); *Rogers v. Benton*, 39 Minn. 39 (38 N. W. Rep. 765; 12 Am. St. Rep. 613); *Willis v. Moore*, 59 Tex. 628 (46 Am. Rep. 284); *Spect v. Spect*, 88 Cal. 437 (26 Pac. Rep. 203; 13 L. R. A. 137; 22 Am. St. Rep. 314). But it must be conceded that even in states having statutes similar to our own the courts are divided in their views as to the effect to be given to the act of taking possession of the land in cases where the mortgagee or his assignee has, before foreclosure, taken possession, peaceably, but without the consent of the mortgagor. The courts of Wisconsin, which seem to follow the adjudications in the state of New York, hold that in such cases ejectment does not lie in favor of the owner to eject the occupant, and that the mortgagee, under such conditions, can continue in possession until the debt secured by the mortgage is paid. See *Brinkman v. Jones*, 44 Wis. 498, and *Hennesy v. Farrell*, 20 Wis. 46. It is probable that the learned trial court followed the rule laid down in the cases last cited. But while we entertain the highest respect for the courts which have enunciated this conclusion, we nevertheless find ourselves unable to accept the same as a sound interpretation of the statutes of this state relating to real estate mortgages. We think the language as well as the logic of the statute demands such a construction by the courts as will secure to the mortgagor the right of possession as against the mortgagee and those claiming under him, and this at all times until title is acquired by a valid foreclosure; this, of course, being subject to the further right of the parties, either by an express stipulation inserted in the mortgage, or by an oral or written agreement subsequently made, to agree that the mortgagee shall have possession before foreclosure. Nor can we understand—much less indorse—the reasoning of some courts, which de-

clare in one breath that the mortgagee before foreclosure, because he has no title to the land, can not maintain ejectment against the mortgagor, and in the next breath declare that when a mortgagee is once in peaceable possession he can not be ejected by the mortgagor. As it appears to us, the right to the possession of mortgaged premises under such a rule is not to be determined by legal principles, nor yet by the provisions of any statute, but is, on the contrary, controlled by mere fleetness of foot. In the race for the land the party will get and hold the possession who first reaches the goal, viz., the actual possession of the land.

The views of the courts in the cases next cited meet with our full approval, and we shall rest the decision in this action upon the authority of said cases and the reasoning contained in them. *Rogers v. Benton*, 39 Minn. 39 (38 N. W. Rep. 765; 12 Am. St. Rep. 613); *Newton v. McKay*, 30 Mich. 380; *Galloway v. Kerr*, (Tex. Civ. App.) 63 S. W. Rep. 180; *Shimerda v. Whohlford*, 13 S. Dak. 155 (82 N. W. Rep. 393); *Johnson v. Sandhoff*, 30 Minn. 197 (14 N. W. Rep. 889); *Bowen v. Brogan*, 119 Mich. 218 (77 N. W. Rep. 942; 75 Am. St. Rep. 387). In *Rogers v. Benton*, 39 Minn. 39 (38 N. W. Rep. 765; 12 Am. St. Rep. 613), Judge Mitchell, speaking for the court, uses this language: 'It follows necessarily from this that a mortgagee, even after condition broken, has no right or remedy except to foreclose his mortgage; that he can not, merely under his mortgage, either recover or maintain possession of the mortgaged premises. The only logical rule is that to constitute a "mortgagee in possession" the mortgagee must be in possession by reason of the agreement or the assent of the mortgagor or his assigns that he have possession under the mortgage and because of it.' In *Newton v. McKay*, 30 Mich. 380, the court said: 'It would be absurd to hold that there could be a right of possession which could not lawfully be enforced.' In *Galloway v. Kerr*, (Tex. Civ. App.) 63 S. W. Rep. 180, the following language is used: 'The possession of the mortgaged premises by the mortgagee, without the consent of the mortgagor or a foreclosure of the mortgage, is wrongful, and it is not necessary for the mortgagor to pay the debt in order to recover possession of the premises.' In the case at bar there is neither allegation, truth, nor claim that the mortgagor consented in any manner to the entry upon the premises made by the defendants, nor was there a stipulation in the mortgage giving the mortgagee a right to

take possession before foreclosure. Nor have we overlooked the case of *Backus v. Burke*, 63 Minn. 272 (65 N. W. Rep. 459)."

Sec. 460. Payment of taxes by mortgagee—Rights acquired. A mortgagee who in good faith pays delinquent taxes on the mortgaged property, in order to protect his lien, upon its being adjudged inferior to a subsequent incumbrance, may be subrogated to the county's lien for such taxes, *Dunismuir v. Port Angeles Gas, Water, Elec. Light & Power Co.*, 30 Wash. 586 (71 Pac. Rep. 9); but in Connecticut it is held that a mortgagee in a mortgage containing no condition as to the payment of taxes and assessments, who, on account of his mortgagor's failure to pay taxes, pays the same in order to protect his security, is not thereby subrogated to the state's rights or remedies for the enforcement of such taxes, so as to be entitled to a foreclosure of the title to the premises under the tax lien. *Sperry v. Butler*, 75 Conn. 369 (53 Atl. Rep. 899). The court say: "The plaintiff in support of his contention in his appeal, invokes the doctrine of subrogation. He says that by his payment of taxes and assessments he has become subrogated to the rights of the municipalities to which payment was made under the liens which existed in their favor. Let us first inquire to what extent, if at all, such subrogation may be had in favor of a private individual. Tax liens are a part of the governmental machinery provided by law to secure public revenues. The operation of this machinery of taxation is placed in the hands of public officials. The powers conferred upon them are in many respects arbitrary and summary. They find their justification in the necessities of government, and their palliation in the fact that public officials alone are intrusted with their exercise, and that they can be used to subserve public ends alone. These powers are oftentimes such as ought not to be at the command of private individuals, and subject to their caprice, greed, or malevolence. Take, for example, the powers which exist in favor of the public in the matter of the collection of taxes. The public representative may immediately, after demand, summarily levy upon estate or body. Clearly these are powers which individual ought not to have over individual. They were devised and intended for the welfare of the organized public, and not to be passed about from man to man. The plaintiff asks to be subrogated to the public right to foreclose. The city of Hartford and the

school district to whom the taxes in question were paid were vested with other rights to secure the collection of the taxes due them. By the same arguments advanced to justify the right now contended for, the right of the plaintiff to avail himself of any of the summary means at the command of the city or school district to enforce the payment of their claims would be supported. Subrogation, to quote the contention of the plaintiff's brief, is 'the substitution of one person in the place of another. * * * The substitute is put in all respects in the place of the party to whose rights he is subrogated.' The argument goes to the full extent of full and complete substitution, to-wit, the vesting in the substitute of all the powers of the party whose place is taken. This argument overlooks the important facts that subrogation is an equitable, and not a legal, right. Its foundation, it is said, is on equity and benevolence. In *re Wallace's Estate*, 59 Pa. 401. It is a doctrine, therefore, which will be applied, or not, according to the dictates of equity and good conscience, and considerations of public policy. When the case is one of the subrogation of the individual to public rights and remedies, the situation assumes an aspect not presented where the substitution relates to private rights. Questions of public policy—questions as to the propriety of turning over the governmental machinery to individuals, and conferring upon them the powers of the organized public—at once arise. The inquiry becomes one not of legislative power to provide for a complete or partial substitution, but one of judicial discretion in the administration of equitable principles under equitable considerations. So it is that the courts ought to hesitate, and have hesitated, to apply the doctrine of subrogation to cases where the substitution would result in conferring upon individuals rights and powers peculiarly designed for and adapted to public purposes, and as a part of the governmental machinery, without statutory sanction, express or implied. *Hinchman v. Morris*, 29 W. Va. 673 (2 S. E. Rep. 863); *Griffing v. Pintard*, 25 Miss. 173; *Trust Co. v. Hart*, 22 C. C. A. 473 (76 Fed. Rep. 673; 35 L. R. A. 352); In *re Wallace's Estate*, 59 Pa. 401. The power of taxation is one of the drastic powers exercised by governmental bodies. Its machinery is skillfully designed to accomplish the desired results most certainly and effectually. It is adapted to its uses, but not to private, unrestrained exercise. Therefore it is that, in the absence of legislation expressly or by reasonable implication authorizing the substitution of the

individual for the community, the powers specially created as incidental to the exercise of the public right of taxation ought not to become delegated to private persons by judicial intervention, unless, indeed, it be in rare and extreme cases. It is quite possible that the implication of authority might properly be raised from a direct statutory obligation to pay a tax due from another. *Bibbens v. Clark*, 90 Ia. 230 (57 N. W. Rep. 884; 59 N. W. Rep. 290; 29 L. R. A. 282, note). Such obligation was present in the case of *Hart v. Tiernan*, 59 Conn. 525 (31 Atl. Rep. 1007), and doubtless was a prominent factor in the conclusion of the court. The situation is a very different one where, as in this case, the only thing inducing the payment was private pecuniary advantage."

Sec. 461. After-acquired property—Railroad mortgages. A duly recorded mortgage by a corporation which, by its express terms, covers all after-acquired property, constitutes a prior lien on poles and wires subsequently acquired by such company and placed by it on the land of another under an agreement with him. *Monmouth County Elec. Co. v. Central R. Co.*, N. J. Eq. (54 Atl. Rep. 140). Property added to the plant of a street railroad, and which becomes an essential and integral part of its road, passes under a mortgage previously executed and recorded covering its entire property and road constructed and to be constructed, although furnished under a contract by which the title was to remain in the seller until payment made. *Westinghouse Elec. Mfg. Co. v. Citizens' St. Ry. Co.*, (Ky.) 68 S. W. Rep. 463 (24 Ky. Law Rep. 334). For construction of particular railroad mortgage, as to passing after-acquired property, see *St. Joseph, St. L. & S. F. Ry. Co. v. Smith*, 170 Mo. 327 (70 S. W. Rep. 700).

A mortgage by a railroad company covering property afterward acquired, "connected with or appertaining to" the railway, does not pass to a purchaser at a foreclosure sale thereunder, whose deed describes the property in the same manner, property acquired after the execution of the mortgage, adjacent to depot grounds of the railway, but never used for railroad purposes, and leased to different parties for a barber shop, grocery, and other uses entirely foreign to the operation of the railway; and such property is subject to sale on a judgment obtained after the execution of the mortgage against the railway company. *Chicago, I. & L. Ry. Co. v. McGuire*, 31 Ind. App. 110 (65 N. E. Rep. 932). The court say: "In speaking of the prop-

erty covered by the after-acquired clause in the mortgage given by a railway company, Mr. Short, in his excellent work on the Law of Railway Bonds and Mortgages, at section 209, says: 'The lien will be confined to the lands which were prospectively necessary and convenient for the construction and future operation of the road, and will not embrace lands situated outside of the "lay-out" of the road, which had been taken over by the company in order to acquire at a less cost the land actually needed for the line itself.' A case very similar to the one under consideration is the case of *Seymour v. Railroad Co.*, 25 Barb. 284. It involved a controversy between the judgment creditors and the purchaser of railroad property at foreclosure sale, and in that case it was squarely held that all lands acquired by the railroad company after the execution of the mortgage which were not used for railroad purposes were not covered by the lien of the mortgage, and did not pass by the foreclosure and sale to the purchaser, but were subject to a lien of the judgment creditors. The court in that case, at page 312, said: 'It is in proof that some of the lands purchased in Batavia have never been used for railroad purposes; that in some instances whole lots were purchased to secure a right of way across them. If the railroad company had purchased a lot of 10 or 100 acres, it can not be that any more of such lots would be embraced in this mortgage to the plaintiffs than was actually taken and required for the road. In respect to all such lands outside of the legal limits of their railroad track and branches, and excepting land used for shops, depots, stations, turnouts for wood or water, or for other legitimate purposes, the lien of the defendant's judgment must prevail.' To the same effect, see *Railroad Co. v. Parker*, 143 U. S. 42 (12 Sup. Ct. Rep. 364; 36 L. Ed. 66); *Railroad Co. v. Coffin*, 50 Conn. 150; *Mississippi Val. R. Co. v. Chicago, St. L. & N. O. R. Co.*, 58 Miss. 896 (38 Am. Rep. 348); *Eldridge v. Smith*, 34 Vt. 484; *Shirley v. Railway Co.*, 78 Tex. 136 (10 S. W. Rep. 543); *Humphreys v. McKissock*, 140 U. S. 304 (11 Sup. Ct. Rep. 1022; 35 L. Ed. 595); *Dinsmore v. Railroad Co.*, 12 Wis. 725; *Farmers' Loan & T. Co. v. Commercial Bank*, 11 Wis. 207; *Walsh v. Barton*, 24 Ohio St. 28).

Sec. 462. Deeds construed as mortgages—Conditional sales distinguished—Title and estate of parties. An unrecorded deed absolute in form, given under a parol agreement

as security for a debt, constitutes the grantee a mortgagee all of whose interest is divested by the payment of the debt and destruction of the deed. *Decker v. Decker*, 64 Neb. 239 (89 N. W. Rep. 795). Citing, *Schade v. Bessinger*, 3 Neb. 140; *Com. v. Dudley*, 10 Mass. 403; *Farrar v. Farrar*, 4 N. H. 191 (17 Am. Dec. 410); *Mussey v. Holt*, 24 N. H. 252 (55 Am. Dec. 234). Where one advances money and redeems property from a mortgage foreclosure, under an agreement to reconvey to the former owner upon his repayment of the amount advanced, the transaction will be treated as a mortgage. *Wilson v. McWilliams*. S. Dak. (91 N. W. Rep. 453). See opinion as to degree of proof required in such case. When land has been transferred by a deed absolute in form, though intended as a security for the payment of a debt, the payment of the debt may be abandoned, and the deed treated as an absolute conveyance, although originally intended as a mortgage, and such arrangement may be made by parol, and be binding. *Cramer v. Wilson*, 202 Ill. 83 (66 N. E. Rep. 869). A deed absolute in form will be treated as a mortgage when it is given to secure payment of a debt, although the parties may have agreed that upon default of payment the deed should become absolute. *First Nat. Bank v. Sargent*, Neb. (91 N. W. Rep. 595; 59 L. R. A. 296). Where a deed absolute on its face is in fact a mortgage and is so treated the parties are clothed with all the rights, are subject to all the liabilities, and entitled to all the remedies of ordinary mortgagors and mortgagees. *Richter v. Noll*, 128 Ala. 198 (30 So. Rep. 740). Cal. Civ. Code, §§ 2920, 2924 construed and applied—absolute deed as mortgage. *Banta v. Wise*, 135 Cal. 277 (67 Pac. Rep. 129). In Georgia it is held that a deed duly executed and recorded to secure a specified debt may by proper written contract between the parties be so extended as to secure, as between them, another debt subsequently contracted by the grantor in favor of the grantee, and the lien of the grantee for the security of such additional debt has priority over the lien of the judgment, obtained by a third party, on an unsecured debt created after the deed was recorded. *McClure v. Smith*. 115 Ga. 709 (42 S. E. Rep. 53). A conveyance of mortgaged premises made to the mortgagee, on an understanding between them that on the payment of the debt within a certain time the premises should be reconveyed, is not a conditional sale, but a mortgage; and the fact that the mortgagee subsequently conveys the premises to another does not give the

mortgagor the right to sue the mortgagee for the difference between the value of the property and the debt, where such subsequent grantee is charged with notice of the mortgagor's right to redeem. *Greenwood Bldg. & L. Ass'n v. Stanton*, 28 Ind. App. 548 (63 N. E. Rep. 574).

The estate remaining in a grantor after a deed absolute intended as a mortgage is an equitable one. *Williams v. Baker*, 62 N. J. Eq. 563 (51 Atl. Rep. 201). It descends to his heirs and may be partitioned among them; but such partition will not be decreed where the right to redeem is barred by the statute of limitations or the laches of such grantor and his heirs. *Fitch v. Miller*, 200 Ill. 170 (65 N. E. Rep. 650). See opinion for particular laches held to bar right to redeem. One purchasing land on foreclosure of a deed of trust given by one holding an absolute deed thereof, which was in fact a mortgage, does not acquire any rights as against the grantor in such absolute deed who remained in possession and of whose rights he had full notice. *Bogenschultz v. O'Toole*, 70 Ark. 253 (67 S. W. Rep. 400).

Sec. 463. Deeds construed as mortgages—Defeasance—Requisites and sufficiency of. Construing and applying Ga. Civ. Code, § 2774, it is held that an instrument in all respects in the form of a deed passing title, and executed for the purpose of securing a described debt, is not, because containing the clause, "Reconveyance of said property to be made upon fulfillment of all the conditions of this instrument," properly to be treated as a mere mortgage. In so far as the decisions of this court in *Frost v. Allen*, 57 Ga. 326, and *Pirkle v. Mortgage Co.*, 99 Ga. 524 (28 S. E. Rep. 34), conflict with what is here laid down, they are, upon a review thereof, overruled. *Pitts v. Maier*, 115 Ga. 281 (41 S. E. Rep. 570). Where a conveyance of land has been executed to secure a note given by the grantor and payable to the grantee, who was acting in the transaction as the agent of a third person, the mere indorsement of the note and deed by the grantee to his principal will not operate to put the title to the land in the principal, so as to enable him, under the provisions of Ga. Civ. Code, § 5432, to make a quitclaim conveyance to the grantor in the security deed, in order to have the land levied upon under an execution issued on a judgment obtained on such note by the principal against the grantor. *Sheppard v. Reese*, 114 Ga. 411 (40 S. E. Rep. 282). See, on this subject,

Parker v. Home Mut. Bldg. & Loan Ass'n, 114 Ga. 702 (40 S. E. Rep. 724); *Austin v. Georgia Loan & Trust Co.*, 115 Ga. 152 (41 S. E. Rep. 264). Pa. Laws 1881, p. 84, providing that "no defeasance to any deed for real estate, regular and absolute upon its face made after the passage of this act, shall have the effect of reducing it to a mortgage," unless such defeasance is duly executed in writing, acknowledged and recorded, does not apply so as to render it void, to a parol agreement, on conveyance of land by a debtor to a creditor in payment of the debt, that both parties should attempt to sell the land, and that on sale any surplus above the debt should be paid to the debtor. *Moran v. Munhall*, 204 Pa. St. 242 (53 Atl. Rep. 1094).

Sec. 464. Action to declare deed a mortgage—Burden and sufficiency of proof. Where, at the time a deed is delivered, it is agreed between the parties that it should operate as a mortgage, the grantor is entitled to a decree to that effect, regardless of whether the redemption clause was omitted from the deed by reason of ignorance, mistake, fraud, or undue influence. *Fuller v. Jenkins*, 130 N. C. 554 (41 S. E. Rep. 706). The right of one to show that an absolute deed under which another holds his property was taken as security for a debt can not be defeated on the ground that no particular time was fixed for the payment of the debt. *Pickett v. Wadlow*, 94 Md. 564 (51 Atl. Rep. 423). The party asserting an absolute deed to be a mortgage has the burden of proving such claim. *Heaton v. Gaines*, 198 Ill. 479 (64 N. E. Rep. 1081). Where an attorney to whom land has been conveyed by his client as security for a debt, in suit by the latter to compel a reconveyance on account of the debt having been satisfied, seeks to defeat the action on the ground that by subsequent agreement between them for a consideration the entire estate became vested in him, has the burden of showing that the later transaction was fair and honest. *Cassem v. Heustis*, 201 Ill. 208 (66 N. E. Rep. 283; 94 Am. St. Rep. 160). A deed may be shown to be a mortgage either by oral or written evidence. *Pickett v. Wadlow*, 94 Md. 564 (51 Atl. Rep. 423); *Yingling v. Redwine*, 12 Okla. 64 (69 Pac. Rep. 810). Whether a deed is a sale or a mortgage depends upon the intention of the parties, and that intention is to be gathered from their declarations and conduct, as well as from the papers which they subscribed. *Saunders v. Ayres*, 63 Neb.

271 (88 N. W. Rep. 526). Citing, *Rockwell v. Humphrey*, 57 Wis. 410 (15 N. W. Rep. 394); *Null v. Fries*, 110 Pa. 521 (1 Atl. Rep. 551); *Campbell v. Dearborn*, 109 Mass. 130 (12 Am. Rep. 671); *Ferris v. Wilcox*, 51 Mich. 105 (16 N. W. Rep. 252; 47 Am. Rep. 551). The circumstances existing at the time of the execution of the deed determine its character, regardless of the effect resulting from changed conditions of the parties. *Herrick v. Teachout*, 74 Vt. 196 (52 Atl. Rep. 432). A deed absolute in form can not be changed into a mortgage by subsequent declarations of the grantee, but they are admissible to show that at the time of its execution it was intended by the parties as a mortgage. *Harp v. Harp*, 136 Cal. 421 (69 Pac. Rep. 28). Miss. Code, § 4233 construed and applied—written evidence required, when. *Schwartz v. Lieber*, 79 Miss. 257 (30 So. Rep. 649); *Schwartz v. Lieber*, Miss. (32 So. Rep. 954). For particular cases in which the evidence is held sufficient to show an absolute deed to be a mortgage, see *Herrick v. Teachout*, 74 Vt. 196 (52 Atl. Rep. 432); *Cassem v. Huestis*, 201 Ill. 208 (66 N. E. Rep. 283; 94 Am. St. Rep. 160); *Saunders v. Ayres*, 63 Neb. 271 (88 N. W. Rep. 526); *Wall v. Albion College*, 130 Mich. 526 (90 N. W. Rep. 321); *Bogenschultz v. O'Toole*, 70 Ark. 253 (67 S. W. Rep. 400). For particular cases in which the evidence is held insufficient to show an absolute deed to be a mortgage, see *Heaton v. Gaines*, 198 Ill. 479 (64 N. E. Rep. 1081); *Little v. Braun*, 11 N. Dak. 410 (92 N. W. Rep. 800); *Frazier v. Frazier*, 129 N. C. 30 (39 S. E. Rep. 634); *Creswell v. Smith*, 61 S. C. 575 (39 S. E. Rep. 757).

Sec. 465. Priority of mortgages. The fact that the words "bargain, sell, and convey," contained in a mortgage, operate as a warranty of the title by virtue of a statute will not cause the instrument to operate to displace or impair an outstanding lien or claim in a third person. *Higman v. Humes*, 127 Ala. 404 (30 So. Rep. 733). A statute (Burns' Ind. Rev. Stat., § 6100) providing that mortgages given to secure a loan of the permanent endowment state university funds "shall be considered as of record from the date thereof; and shall have priority of all mortgages, or conveyances not previously incurred, in the county where the land lies," is within the power of the legislature; and under this statute a purchaser at the foreclosure of such a mortgage has priority over taxes or special assessments subsequent to the mortgage. *Fisher v.*

Brower, 159 Ind. 139 (64 N. E. Rep. 614). Such a purchaser takes free from the claims of the holder of a junior mortgage; and neither the mortgagor nor junior incumbrancer have a right to redeem. *McElwain-Richards Co. v. Gifford*, 159 Ind. 534 (65 N. E. Rep. 576). Where one takes a mortgage on real estate relying upon an erroneous entry made on the tax records of a city by its treasurer through a mistake, to the effect that certain taxes on the real estate were "paid," and afterwards purchases the property on foreclosure for less than the amount of the mortgage debt, his remedy upon discovery of the mistake and the existence of the tax lien is to foreclose as to such lien, setting up the facts by reason whereof it should be postponed, or to compel the holder thereof to redeem from the mortgage, and not to enjoin all assertion of the lien and cut it off entirely. *Philadelphia Mortg. & T. Co. v. City of Omaha*, 63 Neb. 280 (88 N. W. Rep. 523; 57 L. R. A. 150; 93 Am. St. Rep. 442); *Neb.* (90 N. W. Rep. 1005). Where there is no fraud or acts by the interested parties to the prejudice of the rights of others, the priority of the lien of a mortgage is not affected by the giving of a new mortgage intended by the parties simply as a renewal and extension of the old debt, no matter what form the transaction may take in effectuating such purpose. *Higman v. Humes*, 127 Ala. 404 (30 So. Rep. 733).

Sec. 466. Priority of mortgages—Priority of mortgage of corporation over debts incurred by a receiver operating it. Debts incurred by the receiver of an ordinary corporation in the operation of its business, do not constitute a lien superior to a mortgage recorded before the appointment of the receiver. *United States Investment Corp. v. Portland Hospital*, 40 Or. 523 (67 Pac. Rep. 194). The court say: "Where a court of chancery takes possession of a railroad or other similar property of public corporations, and operates the same through a receiver, debts contracted for labor, supplies, and other necessary purposes, before as well as after the appointment of the receiver, may be made a first lien upon the income, and, if that is not adequate, upon the corpus of the property. But this is an extraordinary power, exercised only in cases of railroad and other like corporations of a quasi public character charged with a public duty, and for reasons peculiar to that character of property. *McCormack v. Railway Co.*, 34 Or. 543 (56 Pac. Rep. 518, 1022); *Merriman v.*

Mining Co., 37 Or. 321 (56 Pac. Rep. 75; 58 Pac. Rep. 37; 60 Pac. Rep. 997); *Green v. Railroad Co.*, 97 Ga. 15 (24 S. E. Rep. 814; 33 L. R. A. 806; 54 Am. St. Rep. 379, and note). But under none of the authorities is a court authorized to thus displace contract liens upon the property of individuals or private corporations. 'Extensive as are the powers of a court of equity,' says Judge Gresham, 'they do not authorize a chancellor to thus impair the force of solemn obligations and destroy vested rights. Instead of displacing mortgages and other liens upon the property of private corporations and natural persons, it is the duty of courts to uphold and enforce them against all subsequent incumbrances. It would be dangerous to extend the power which has recently been exercised over railroad mortgages (sometimes with unwarranted freedom) on account of their peculiar nature, to all mortgages.' *Farmers' Loan & Trust Co. v. Grape Creek Coal Co.*, (C. C.) 50 Fed. Rep. 481 (16 L. R. A. 603). In an exceptionally strong and vigorous opinion by Judge Caldwell in *Hanna v. Trust Co.*, 16 C. C. A. 586 (70 Fed. Rep. 2; 30 L. R. A. 201), reversing an order and decree authorizing a receiver of an irrigating company appointed on the application of a junior mortgagee to borrow money and issue certificates to be preferred liens on the property, for the purpose of maintaining, protecting and preserving it, it is said: 'The rights of the citizen, lawfully acquired by contract, are under the protection of the constitution of the United States, and, like the absolute rights of the citizen, are not dependent for their existence or continuance upon the discretion of any court whatever. Constitutional rights and obligations are no more dependent upon the discretion of the chancellor than they are on the discretion of the legislature. * * * If it were once settled that a chancery court, through a receiver appointed on the petition of a junior mortgagee, could carry on the business of such insolvent corporations at the risk and expense of those holding the first or prior liens on the property of the corporation, such liens would have little or no value. It is no part of the duty of a court of equity to conduct the business of insolvent private corporations, any more than it is to carry on the business of insolvent natural persons. If it may take under its control the property of an insolvent private corporation, and authorize a receiver to carry on its business, and make the debts incurred by the receiver in so doing paramount liens on all the property of the corporation, and enjoin its creditors in the meantime from

collecting their debts, it is not perceived why it may not proceed in the same way with the estate of an insolvent natural person.' See, also, *Farmers' Loan & Trust Co. v. Grape Creek Coal Co.*, 50 Fed. Rep. 481 (16 L. R. A. 603, and note); *Vilas v. Page*, 106 N. Y. 439 (13 N. E. Rep. 743); *Seventh Nat. Bank v. Shenandoah Iron Co.*, (C. C.) 35 Fed. Rep. 436; *Fidelity Ins. & Safe Deposit Co. v. Shenandoah Iron Co.* (C. C.) 42 Fed. Rep. 372; *Fidelity Ins. & Safe Deposit Co. v. Roanoke Iron Co.*, (C. C.) 68 Fed. Rep. 623; *Snively v. Coal Co.*, (C. C.) 69 Fed. Rep. 204; *Doe v. Transportation Co.*, (C. C.) 78 Fed. Rep. 62; *Hoover v. Trust Co.*, 81 Md. 559 (32 Atl. Rep. 505; 29 L. R. A. 262)."

Sec. 467. Priority of mortgages—Agreements fixing—
New mortgage taken by prior mortgagee. When decrees of foreclosure are entered upon several mortgages in the same action, and an order of sale is issued thereon, an agreement between the several mortgagees that the one holding the later lien shall buy the property at the sheriff's sale under said order, and pay the matured portion of the first mortgage, and the unmatured portion thereof shall remain in full force, is valid as against one who, with notice of such agreement, afterwards takes a mortgage from the holder of the later lien, who has purchased the property in pursuance of such agreement. A certificate of satisfaction of said decrees, issued by the clerk of the court on his own motion, and filed in the office of the register of deeds, will not, in favor of one who, with notice of such agreement, takes a mortgage from such purchaser at sheriff's sale, operate to cancel the first mortgage. *Ryan v. West*, 63 Neb. 894 (89 N. W. Rep. 416). Where a senior mortgagee sells the mortgaged lands under a power of sale contained in his mortgage and takes a mortgage to secure the purchase price, such mortgage is superior to that held by a junior mortgagee. *Threefoot v. Hillman*, 130 Ala. 244 (30 So. Rep. 513; 89 Am. St. Rep. 39). Where the holder of a deed of trust takes a new deed of trust for a balance of his debt and releases the first deed of trust, with knowledge that another holds a lien subsequent to the first deed of trust, such third party gets preference over the second deed of trust, and equity will not cancel the release against such second lienor, except for fraud or mistake. *Atkinson v. Plum*, 50 W. Va. 104 (40 S. E. Rep. 587; 58 L. R. A. 788; see pp. 788-807 for

exhaustive collation of authorities on "Right to reinstatement of mortgage when released or discharged by mistake").

Sec. 468. Priority of mortgages—Mortgage for future advances. A mortgage given to secure a certain sum constitutes a potential lien for that amount, though under a contemporaneous parol agreement part of the consideration is to be advanced after the execution of the mortgage; and such a mortgage has priority over a mechanic's lien for alterations on the mortgaged property, subsequently filed, though the alterations were commenced before the execution of the mortgage, the mortgagee not having actual notice thereof. *N. J. Laws 1898, p. 538, § 10 applied. Reed v. Rochford, 62 N. J. Eq. 186 (50 Atl. Rep. 70).* The lien of a mortgage given on lots for specified amounts by a grantee thereof to his grantor to secure their purchase price and future advances which the mortgagee agreed to make in installments as buildings, which the mortgagor promised to erect, progressed, attaches at the date of its execution and recording so as to have preference over a mechanic's lien for the construction of such buildings, although such advances were made after notice of the commencement of the lien claimant's work; and it is not necessary to the validity of such lien that the purpose for which the mortgage was made shall appear on its face or that the agreement as to the advances shall be recorded, nor that such an agreement require that the advances should only be used for construction of the houses. The same right of priority is held to exist in favor of a mortgage executed to one without any consideration, but subsequently assigned to a third person who contracted to make advances, though the assignment was made after the lien claimant commenced work, the contract for the making of the advancements and the assignment of the mortgage being contemporaneous with its execution. *Blaskmar v. Sharp, 23 R. I. 412 (50 Atl. Rep. 852).*

Sec. 469. Assumption of mortgage—Taking conveyance subject to mortgage. One purchasing land subject to a mortgage without any knowledge that the record of the mortgage erroneously understates the amount of the indebtedness secured by the mortgage, and in reliance upon such record, can not be held liable for a greater amount than shown by such record. *Osborn v. Hall, 160 Ind. 153 (66 N. E. Rep. 457).* A conveyance of real estate subject to a mortgage is,

in substance, a conveyance of so much of the property only as is not required for the satisfaction of the mortgage debt; and the land conveyed is in equity, as between the grantor and grantee, the primary debtor. The grantee in such a case can not repudiate his contract to hold subject to the mortgage. *McNaughton v. Burke*, 63 Neb. 704 (89 N. W. Rep. 274); *Frerking v. Thomas*, 64 Neb. 193 (89 N. W. Rep. 1005). Where a deed of mortgaged land recites that the conveyance is made subject to the mortgage and the amount thereof is deducted from the purchase price, the land is charged with the payment of the mortgage as effectually as if the grantee had assumed the payment, and he is estopped to deny its validity, *Hadley v. Clark*, Ida. (69 Pac. Rep. 319); but the grantee is not thereby charged with any personal liability for the debt, *Lexington Bank v. Salling*, Neb. (92 N. W. Rep. 318). A third party taking a conveyance of mortgaged premises from the grantee of a mortgagor takes subject to the mortgage, although his deed does not refer to it, where the deed to his immediate grantor from the mortgagor is duly recorded, and expressly recites that it was subject to the mortgage. *Foster v. Bowles*, 138 Cal. 346 (71 Pac. Rep. 494).

Sec. 470. Assumption of mortgage—Agreement of assumption—Personal liability. An agreement by the grantee of mortgaged property to assume the mortgage will not be implied, but must be proven, and the mortgagee relying on such an agreement has the burden of proof. *Heffernan v. Weir*, 99 Mo. App. 301 (72 S. W. Rep. 1085). The court say: "While it is unnecessary that the contract of a grantee to assume payment of an existing incumbrance, as part of the consideration for which a conveyance of realty is made, should be in writing, and a verbal promise of such assumption is valid and enforceable in equity, yet the promise to pay must be established by clear and cogent evidence, and can not be implied by inference. 2 Devl. Deeds, § 1073; *Ordway v. Downey*, 18 Wash. 412 (51 Pac. Rep. 1047; 52 Pac. Rep. 228; 63 Am. St. Rep. 892); *Bensieck v. Cook*, 110 Mo. 173 (19 S. W. Rep. 423; 33 Am. St. Rep. 422)." An agreement by a grantee of mortgaged premises to assume and pay the mortgage debt may be shown by parol. *Bossingham v. Syck*, 118 Ia. 192 (91 N. W. Rep. 1047). The phrase "all other liens" in a covenant by a grantee in a warranty deed to assume and pay "all unpaid taxes and mortgages shown of record and all other liens, in-

cluding the attachment proceeding now pending," does not include an unrecorded mortgage, though the grantee had notice thereof. *Whicker v. Hushaw*, 159 Ind. 1 (64 N. E. Rep. 460). A stipulation in an executory contract for the purchase of mortgaged land that as the installments of the purchase price matured they should be applied on the mortgage debt until it was reduced to a certain sum does not amount to an assumption by the vendee of the payment of the mortgage debt. *Ayres v. Makely*, 131 N. C. 60 (42 S. E. Rep. 454).

A grantee who agrees and assumes to pay off an incumbrance on the land as a part of the purchase price thereby becomes to the lien creditor primarily liable for the debt; and, while the grantor will remain equally bound by his obligation, yet as between him and his grantee he becomes surety, and his grantee principal debtor. *Todd v. Oglebay*, 158 Ind. 595 (64 N. E. Rep. 32). Successive grantees of mortgaged premises who have assumed and agreed to pay the mortgage debt are all liable for it, and the commencement by the mortgagee of an action to foreclose and for personal judgment against one of them is not a waiver of his rights against the others. *Bosingham v. Syck*, 118 Ia. 192 (91 N. W. Rep. 1047). One named as a grantee in a deed of mortgaged lands without his consent, for the convenience of the real party in interest, is not liable for a deficiency upon foreclosure of the mortgage, by reason of a covenant of assumption inserted in the deed without his knowledge. *Gill v. Robertson*, Colo. App. (71 Pac. Rep. 634). Mortgaged lands in the hands of subsequent purchasers are not bound for a greater rate of interest than that stipulated in the mortgage as recorded, unless the purchaser may have assumed and agreed to pay a greater rate that may be stipulated in the notes, but not shown in the mortgage as recorded. *George v. Butler*, 26 Wash. 456 (67 Pac. Rep. 263; 57 L. R. A. 396; 90 Am. St. Rep. 756). Citing, *Whittacre v. Fuller*, 5 Minn. 508 (Gil. 401); *Gardner v. Emerson*, 40 Ill. 296; *Gilchrist v. Gough*, 63 Ind. 576 (30 Am. Rep. 250). One who purchases property subject to a usurious mortgage thereon or who assumes and agrees to pay such a mortgage as a part of the purchase price can not take any advantage of the usury in the transaction; and this rule is applied in all its scope to a grantee who purchases premises covered by a usurious mortgage given to a building and loan association. *Irwin v. Washington Loan Ass'n*, 42 Or. 105 (71 Pac. Rep. 142); *Frost v. Pacific Sav. Co.*, 42 Or. 44 (70 Pac. Rep. 814). In sup-

port of the second proposition, the court in the last case cite: *Thomp. Bldg. Ass'ns* (2d Ed.) § 261; *Association v. Walker*, 59 Neb. 456 (81 N. W. Rep. 308); *Same v. Bilan*, 59 Neb. 458 (81 N. W. Rep. 308); *Association v. Heidler*, 55 Ia. 424 (5 N. W. Rep. 578; 7 N. W. Rep. 686); *Anderson v. Mortgage Co., (Ida.)* 69 Pac. Rep. 130; *Stein v. Association*, 18 Ind. 237 (81 Am. Dec. 353); *Bank v. Collins*, 27 Conn. 142; *Association v. Sellers*, 19 Tex. Civ. App. 201 (46 S. W. Rep. 370).

Sec. 471. Assumption of mortgage—Who may maintain action on covenant of assumption. Applying Pa. Laws 1878, p. 205, providing that the grantee of real estate subject to a ground rent, mortgage, or other incumbrance, shall not be personally liable for the payment of such ground rent, mortgage, or other incumbrance, unless, by agreement in writing, he shall have expressly assumed a personal liability therefor, it is held that an action by a mortgagee on such an agreement by a grantee can be maintained only in the name of the grantor and with his consent. *Fisler v. Reack*, 202 Pa. St. 74 (51 Atl. Rep. 599). Conn. Pub. Laws 1881, ch. 97 (Gen. Stat., § 983), providing that where a conveyance of mortgaged property contains a provision that the grantee shall assume the mortgage, the holder thereof may maintain an action on such promise without any assignment, is constitutional, and is not limited to conveyances by the mortgagor, but extends to subsequent conveyances. And in an action under this statute against the last of several grantees, all of whose deeds have been made subject to the mortgage, the certified copies from the land records of the intermediate conveyances are admissible without proof of execution and delivery. *Clochester Sav. Bank v. Brown*, 75 Conn. 69 (52 Atl. Rep. 316).

Sec. 472. Assumption of mortgage—Action by mortgagee on covenant of assumption in executory contract of sale followed by warranty deed of mortgagor. A mortgagee may enforce against his mortgagor's grantee a covenant by the latter contained in an executory contract under which the land was conveyed to him, to assume the mortgage, although the mortgagor has conveyed by warranty deed; and if the grantee relies on a modification of such covenant the burden is upon him to show it. *Whicker v. Hushaw*, 159 Ind. 1 (64 N. E. Rep. 460). The court say: "Although the point has

not been urged upon our consideration by counsel, we approached the question as to the appellant's liability in this case with a doubt that was due to the fact that the contract sued on was executory, and had been consummated on the part of appellee Margaret by the execution of the deed. In a case where a corporation, by resolution, agreed to assume the bonded indebtedness of another corporation, which agreement was accepted by the latter corporation, the supreme court of the United States held that the bondholders could not avail themselves of the arrangement, because it constituted at most only an executory agreement *inter partes*. *Second Nat. Bank v. Grand Lodge of Free & Accepted Masons*, 98 U. S. 123 (25 L. Ed. 75). But in the case of an executory contract, in writing, for the sale of real property, the person agreeing to purchase has not merely a chose in action, but in the eye of a court of equity he has an enforceable right to the land, and on the other hand the vendor can compel performance. For this reason, we think that a promise to pay a mortgage that is a part of an executory contract to sell real estate is to be regarded as of such ultimate character that, upon performance by the vendor, an obligation in favor of the holder of the mortgage may attach. But for this evidentiary force, there would be no occasion for the vendor, upon executing a deed, to take a new obligation, for the promise to pay the incumbrance could be shown even as against the vendor's general warranty. As said by Mr. Jones, in his work on Mortgages (at section 750): 'Even a verbal promise by a purchaser to assume and pay a mortgage is valid, and may be enforced in equity not only by the grantor, but by the holder of the mortgage. A covenant in the deed that the premises are free from incumbrances, or a recital that the consideration has been paid in full, does not estop either the grantor or the holder of the mortgage from proving the agreement and recovering upon it.' And see, also, *Wilson v. King*, 23 N. J. Eq. 150; *Merriman v. Moore*, 90 Pa. 78; *Remington v. Palmer*, 62 N. Y. 31; *Taintor v. Heimmigway*, 18 Hun, 458; *Bolles v. Beach*, 22 N. J. L. 680 (53 Am. Dec. 263); *Carver v. Louthian*, 38 Ind. 530; *Gavin v. Buckles*, 41 Ind. 528; *Bever v. Bever*, 144 Ind. 157 (41 N. E. Rep. 944); *Boruff v. Hudson*, 138 Ind. 280 (37 N. E. Rep. 786). The execution of a deed poll may, therefore, be regarded as performance on the part of the vendor, leaving the matter of performance on the part of the grantee dependent upon his prior agreement. *Barker v. Bradley*, 42

N. Y. 316 (1 Am. Rep. 521). From these considerations, we have concluded that the mere fact of the assumption of a mortgage indebtedness in an executory contract will not prevent the person holding the mortgage from availing himself of it while it yet remains the agreement of the vendor and the vendee. See *Insurance Co. v. Hutchings*, 100 Ind. 496; *Romaine v. Judson*, 128 Ind. 403 (26 N. E. Rep. 563; 28 N. E. Rep. 75); *Judson v. Romaine*, 8 Ind. App. 390 (35 N. E. Rep. 912)."

Sec. 473. Assignment of mortgage. An assignment of the note secured by a mortgage carries with it the mortgage, and operates as a transfer thereof without a formal or written assignment. *Snell v. Margritz*, 64 Neb. 6 (91 N. W. Rep. 274). Where the mortgage debt has been assigned, a purchaser in good faith without notice of the assignment will be protected by a release of the mortgage executed by the original mortgagee. *Cheshire Provident Inst. v. Gibson*, (Neb.) 89 N. W. Rep. 243. The purchaser of an equity of redemption can not require the mortgagee or his assignee to assign the mortgage and mortgage debt to him upon being tendered the amount thereof. The only duty of the mortgagee or his assignee upon being tendered the amount of the debt is to discharge or cancel the mortgage. That the assignee of the mortgage has agreed with the original mortgagor to purchase the mortgage and foreclose it, and, if not redeemed, to afterwards convey the property to him upon agreed terms, does not entitle the purchaser from the mortgagor to have the mortgage and debt assigned to him. *Lumsden v. Manson*, 96 Me. 357 (52 Atl. Rep. 783).

Sec. 474. Assignment of mortgage—Recording. Under Burns' Ind. Rev. Stat., § 1107 an assignment of a mortgage is entitled to record, and a holder of such an assignment who fails to record it can not enforce his mortgage against a subsequent purchaser for a valuable consideration not shown to have taken with notice of the assignment. *Artz v. Yeager*, 30 Ind. App. 677 (66 N. E. Rep. 917). The assignment of a mortgage which arises as an incident to the assignment of the note secured by it is not such an assignment as comes within Burns' Ind. Rev. Stat., §§ 1107a-1107c, requiring one who transfers or assigns a real estate mortgage to do so in writing either on the margin of the record where such mortgage is

recorded or by a separate written instrument duly executed and acknowledged, and imposing a penalty on the assignee failing to record such assignment. *Perry v. Fisher*, 30 Ind. App. 261 (65 N. E. Rep. 935). An assignment of a mortgage is such an instrument as is required by Neb. Comp. Stat., ch. 73, § 16, 46, to be recorded to preserve its validity against subsequent purchasers whose deeds, mortgages or other instruments are first recorded. *Ames v. Miller*, (Neb.) 91 N. W. Rep. 250. In Nebraska an assignee of a mortgage, whose assignment is not of record, is barred by a decree foreclosing a prior lien in a suit to which his assignor, who appeared of record as owner of the incumbrance was made a party, unless he records his assignment prior to the recording of the deed under judicial sale pursuant to such decree. *Gillian v. McDowell*, Neb. (92 N. W. Rep. 991).

Sec. 475. Assignment of mortgage—Title and rights of assignee. The assignee of a mortgage acquires all the rights of his assignor. *Darr v. Spencer*, 63 Neb. 89 (88 N. W. Rep. 164). An assignee without notice is charged with the equities existing in favor of the mortgagor in respect to the mortgage assigned. *Paulson v. Koon*, 85 Minn. 240 (88 N. W. Rep. 760). A bona fide assignee for value of a mortgage takes it free from all latent ambiguities existing in favor of third parties; but one taking an assignment of the mortgage as collateral security for a pre-existing debt without delivering up the evidence of such debt is not a bona fide purchaser within this rule. *Tate v. Security Trust Co.*, 63 N. J. Eq. 559 (52 Atl. Rep. 313). An absolute deed being in fact a mortgage to secure a note, one taking an assignment of the note and a quitclaim deed from the mortgagee with knowledge of the facts acquires merely the lien of the mortgage, under S. Dak. Comp. Laws, § 3243, as an incident to the transfer of the note. *State v. Mellette*, S. Dak. (92 N. W. Rep. 395). The assignee of a note constituting commercial paper and the mortgage securing it, after maturity of the note, takes subject to all the defenses which could have been asserted against the original holder, *Marshall v. Shiff*, 130 Ala. 545 (30 So. Rep. 335); but one taking an assignment of a negotiable promissory note secured by a mortgage, before its maturity, acquires title to both discharged of existing equities, and the absence of the mortgage at the time of such assignment does not give a prior assignee whose assignment is un-

recorded any superior rights. *Boyle v. Lybrand*, 113 Wis. 79 (88 N. W. Rep. 904). Where a mortgagor who fears foreclosure employs an attorney to obtain a settlement of the debt or a purchaser for the mortgage, and he negotiates a sale and assignment of the mortgage to a corporation of which he was a director, at a large discount, such corporation can foreclose only for the amount paid for the assignment, with interest and attorney's fees. *Security Sav. Soc. v. Cohalan*, 31 Wash. 266 (71 Pac. Rep. 1020).

Sec. 476. Assignment of mortgage—Payment after assignment. One making payment to the original mortgagee before it is due of a negotiable note secured by the mortgage, without demanding a surrender of the note, assumes the risk of the note being held by some one else under a previous assignment. *Snell v. Margritz*, 64 Neb. 6 (91 N. W. Rep. 274); *Garnett v. Myers*, Neb. (91 N. W. Rep. 400); *Northern Counties Inv. Trust v. Edgar*, Neb. (91 N. W. Rep. 402). One taking an assignment of a mortgage, assignable only in equity, must give notice of such assignment to the maker of the mortgage, if he would protect himself from payment to the original holder. *Napieralski v. Simon*, 198 Ill. 384 (64 N. E. Rep. 1042). A mortgagor whose note and mortgage has been assigned, and the assignee acquiesces in his making payments of interest and a partial payment of principal to the assignor, is not bound by a subsequent revocation by the assignee of the assignor's authority to collect the principal, of which he had no notice; but the payment of the principal to the assignor was binding on the assignee. *Fitzgerald v. Beckwith*, 182 Mass. 177 (65 N. E. Rep. 36). Cal. Civ. Code, § 2935 construed and applied—payment to holder of note after assignment of mortgage duly recorded. *Rodgers v. Parker*, 136 Cal. 313 (68 Pac. Rep. 975).

Sec. 477. Payment, release and satisfaction. The full payment before maturity of the note secured by a mortgage leaves the mortgagee with no estate in or title to the premises; so that a subsequent assignment of the mortgage by the mortgagee without consideration and for the benefit of the mortgagor conveys nothing. Nor is the title changed by the reissue of the note with a stipulation that the mortgage should continue in force. *Flye v. Berry*, 181 Mass. 442 (63 N. E. Rep. 1071). A mortgage is not discharged by payments, although

they aggregate the full amount of the debt, made by the mortgagor's agent out of his own funds where they were not credited on the note at his request because "he wanted the mortgage kept alive," and at the time he made them he knew the mortgage was to be assigned. *Everett v. Gately*, 183 Mass. 503 (67 N. E. Rep. 598). A mortgage given by a third party as collateral security for a judgment under an agreement that the judgment creditor shall collect it from certain property subject thereto, will be discharged, and all foreclosure proceedings thereunder rendered void, if the judgment creditor satisfies the judgment and releases the property without collecting the debt. *Finnegan v. Janeway*, 85 Minn. 384 (89 N. W. Rep. 4.) A mortgagee who fails to embrace in his action to foreclose, in which he is given a personal judgment for any deficiency, a tract of land against which he might have enforced the lien of his mortgage, thereby waives his lien as to such tract. *Dooly v. Eastman*, 28 Wash. 564 (68 Pac. Rep. 1039). Where one holding as assignee thereof a note secured by mortgage, without a formal assignment of the mortgage, files his claim in insolvency proceedings against the mortgagor without disclosing his security, accepts a dividend, and a formal release is filed and judgment entered discharging the insolvent from all debts and liabilities, he can not, upon procuring a formal assignment of the mortgage, be allowed to foreclose the same to satisfy a balance alleged to be due on the mortgage debt. *First Nat. Bank v. Pope*, 85 Minn. 433 (89 N. W. Rep. 318).

Sec. 478. Release of part of mortgaged premises. In order for a purchaser of a parcel of land embraced in a mortgage to claim its release from such mortgage on account of the mortgagee having released such mortgage as to other parcels after such purchase it must be shown that the mortgagee had actual notice of such purchaser's purchase; mere constructive notice arising from the recording of his deed is not sufficient. *Balen v. Lewis*, 130 Mich. 567 (90 N. W. Rep. 416). A stipulation in a deed of trust giving the grantors the right to sell any portion of the property, at a price satisfactory to the cestui que trust, who was to be consulted as to such sale, and to have such portion released by payment on the debt of the price received, does not give them a right to pay the mortgage debt before maturity with money obtained by

placing a second mortgage on the land. *Snow v. Bass*, 174 Mo. 149 (73 S. W. Rep. 630).

Sec. 479. Discharge of lien by tender of debt secured.

The lien of a trust deed or mortgage is not forfeited by a tender after due of the debt secured, but such tender only stops the running of interest, unless it is kept up, which amounts to payment of the debt. *Kollenberg v. Nixon*, 171 Mo. 445 (72 S. W. Rep. 41; 94 Am. St. Rep. 790). The court say: "In *Thornton v. National Exchange Bank*, 71 Mo. 221, it was held by this court, in a per curiam opinion, that the release of a deed of trust given to secure the payment of one-half of several notes held by different persons, executed by the mortgagor's husband and another person, to secure whose liability a similar deed of trust was also given, is discharged as to one of such notes by the unaccepted tender of half of the amount of such notes. That case is cited with approval in the subsequent case of *McClung v. Trust Co.*, 137 Mo. 106 (38 S. W. Rep. 578) and in *Campbell v. Seeley*, 38 Mo. App. 298. See, also, *Crain v. McGoon*, 86 Ill. 431 (29 Am. Rep. 37). But as to whether or not a tender of the amount due upon a debt secured by a deed of trust or mortgage upon real estate made after the debt becomes due, and before sale of the property under such deed of trust, releases the mortgage lien, or not, the authorities are in great conflict. At common law the rule is that such tender does not discharge the mortgage lien, but stops the running of interest upon the debt from that time. 13 Am. & Eng. Enc. Law, 873; 1 Jones, Mortgages (4th Ed.) sec. 892; 1 Pingrey on Mortgages, sec. 1112; *McClung v. Trust Co.*, 137 Mo. 106 (38 S. W. Rep. 578, and authorities cited); *Hudson v. Glencoe Gravel Co.*, 140 Mo. 103 (41 S. W. Rep. 450; 62 Am. St. Rep. 722). But as a general rule, in those states where the mortgage is only a lien, as in this state, the mortgagee, after condition broken, may recover in ejectment the mortgaged land, if the debt, interest, and costs be not paid before judgment, yet when paid or tendered, even after suit brought if before judgment, the lien is extinguished, and operates to defeat his right to the possession, and no reconveyance is necessary in order to reinvest in the mortgagor the title or right to the possession. When the tender is made, the mortgagee's right to the possession is terminated. *Kortright v. Cady*, 21 N. Y. 343 (78 Am. Dec. 145); *Potts v. Plaisted*, 30 Mich. 149; *Van Husan v. Kanouse*, 13 Mich. 303; *Caruthers*

v. Humphrey, 12 Mich. 270; Moynahan v. Moore, 9 Mich. 9 (77 Am. Dec. 468); Bailey v. Metcalf, 6 N. H. 156; Robinson v. Leavitt, 7 N. H. 73; Salinas v. Ellis, 26 S. C. 337 (2 S. E. Rep. 121); McClellan v. Coffin, 93 Ind. 456. In Kortright v. Cady, 21 N. Y. 366 (78 Am. Dec. 145), it is said: 'The proposition that a tender of the money due on a mortgage, made at any time before a foreclosure, discharges the lien, is the logical result of premises which are admitted to be true. These are that the mortgagor has the same right after as before a default to pay his debt, and so clear his estate from the incumbrance, and that, payment being actually made, the lien thereby becomes extinct. We have, then, only to apply an admitted principle in the law of tender, which is that tender is equivalent to payment as to all things which are incidental and accessory to the debt. The creditor, by refusing to accept, does not forfeit his right to the very thing tendered, but he does lose all collateral benefits or securities. Coit v. Houston, 3 Johns. Cas. 243; Raymond v. Bearnard, 12 Johns. 274; Dunham v. Jackson, 6 Wend. 22; Hunter v. Le Conte, 6 Cow. 728; Coggs v. Bernard, 2 Ld. Raym. 916. Thus, after the tender of a money debt, followed by payment into court, interest and costs can not be recovered. The instantaneous effect is to discharge any collateral lien, as a pledge of goods or the right of distress. It is not denied that the same principle applies to a mortgage, if the tender be made at the very time when the money is due. If the creditor refuses, he justly loses his security. It is impossible to hold otherwise, although the tender be made afterwards, unless we also say that the mortgage, which was before a mere security, becomes a freehold estate by reason of the default. That this is not true, has been sufficiently shown. It is said that mortgagees will be put to great inconvenience if at any period, however distant from the time of maturity, they must know the amount of the debt, and accept a tender on peril of losing their security. The force of this argument is not perceived. As a tender must be unqualified by any conditions, there can never be any good reason for not accepting the sum offered, whether it be offered when it is due or afterwards. By accepting the tender, the creditor loses nothing, and incurs no hazard. If the sum be insufficient, the security remains. It is only by refusing that any inconvenience can possibly arise. But whatever may be the consequences of refusal, the creditor may justly charge them to his own folly.' The question was first before this court in

Olmstead v. Tarsney, 69 Mo. 399, wherein it is said: 'A tender by the debtor to the mortgagee on the law day will undoubtedly discharge the lien of the mortgage; and it has been repeatedly held that a tender by the debtor to a mortgagee of the amount of his debt after the law day, or at any time before foreclosure, will discharge the lien of the mortgage.' But in *Hudson v. Glencoe Gravel Co.*, 140 Mo. 103 (41 S. W. Rep. 450; 62 Am. St. Rep. 722), it was held that a tender after maturity of the debt secured by deed of trust on land does not extinguish the lien. The same general rule was announced in *McClung v. Trust Co.*, 137 Mo. 106 (38 S. W. Rep. 578). *Landis v. Saxton*, 89 Mo. 375 (1 S. W. Rep. 359), goes further, and holds that, in order to defeat the lien of a mortgage, the tender must not only be made, but must be kept up. That action was not, however, for the purpose of declaring a mortgage lien forfeited, but was for the purpose of having declared paid a note for the sum of \$15,000 which plaintiff had executed to Saxton, and secured by deed of trust upon real property, and for which plaintiff sued to have declared paid, and the deed of trust satisfied, upon the ground that all of the debt and interest had been paid prior to the 10th day of June, 1881, except \$6,200, at which time plaintiff tendered to Saxton that sum,—being, as he claimed, the balance due on said notes,—but which was refused by Saxton. The tender was not kept up. It was held that under section 1008, Rev. Stat. 1879, which provides that 'where a tender and no deposit shall be made as provided in the preceding section, the tender shall only have the effect, in law to prevent the running of interest or accumulation of damages from and after the time such tender was made,' the only effect of the tender, if sufficient in amount, was to stop the running of interest. The court said: 'The tender can not have the effect to deprive the defendant of his security created by the deed of trust for so much as may be found due at the time the tender was made. Authorities cited do say that, where a tender has been made of the amount due, it discharges the lien; still, without regard to the statute, a court of equity would not decree affirmative relief, such as the release or satisfaction of a mortgage or deed of trust, or other lien, without payment of the amount due at the date of the tender. A party who seeks equitable relief must do equity. Until plaintiff does make such payment, he can not have the deed of trust declared satisfied, as prayed for in his petition. *Tuthill v. Morris*, 81 N. Y. 98; *Cowles*

v. Marble, 37 Mich. 158. But so far as this case is concerned, the statute before quoted is conclusive, and, as before stated, the only effect of the tender was to stop the running of interest.' To the same effect are *Crain v. McGoon*, 86 Ill. 431 (29 Am. Rep. 37); *Matthews v. Lindsay et al.*, 20 Fla. 962; *Cowles v. Marble*, 37 Mich. 158. In *Tuthill v. Morris*, 81 N. Y. 94, it is said: 'A party coming into equity for affirmative relief must himself do equity; and this would require that he pay the debt secured by the mortgage, and the costs and interest, at least up to the time of the tender. There can be no pretense of any equity in depriving the creditor of his security for his entire debt, by way of penalty for having declined to receive payment when offered. The most that could be equitably claimed would be to relieve the debtor from the payment of interest and costs subsequently accruing; and, to entitle him to this relief, he should have kept his tender good for the time it was made. If any further advantage is gained by a tender of the mortgage debt, it must rest on strict legal, rather than on equitable, principles. The circumstance that a security has become or is invalid in law, and could not be enforced, even in equity, does not entitle a party to come into a court of equity, and have it decreed to be surrendered or extinguished, without paying the amount equitably owing thereon. Even securities void for usury would not be cancelled by a court of equity without payment of the debt, with legal interest, until by statute it was otherwise provided. This statute does not change the general principle of equity, but on the contrary, recognizes it, by excepting cases of usury from its operation. On this ground, even if the alleged tender could be sustained, the plaintiff was not entitled to a decree for the unconditional extinguishment of the mortgage.' It thus appears that this court, with respect to the effect of a tender, after due, of a debt secured by a deed of trust or a mortgage, adheres to the common-law rule,—that is, its only effect is to stop the running of interest on the debt from that time,—but that in pursuance of statutory enactment (sections 2937, 2938, Rev. Stat. 1889), and upon principles of equity, it has gone farther, and holds that, in order that the tender may extinguish the mortgage lien, it must be kept up—*Landis v. Saxton*, 89 Mo. 375 (1 S. W. Rep. 359); *Hudson v. Glencoe Gravel Co.*, 140 Mo. 103 (41 S. W. Rep. 450; 62 Am. St. Rep. 722),—which is practically much the same thing as a bill in equity by the mortgagor, or those holding under him, to redeem. It follows

that there is no such thing in this state as the forfeiture of the lien of a deed of trust or mortgage by tendering the amount due which is secured thereby, although refused by the holder of the mortgage, but that the only effect of such tender is to stop the running of the interest after that time unless the tender be kept up, which amounts to nothing more or less than the payment of the mortgage debt, less the interest, from the time of the tender; for, if by the tender the lien is forfeited, it is forfeited eo instante, and can not be reinstated by keeping up the tender."

Sec. 480. Authority to receive payment—Payment to agent. The maker of a note secured by mortgage may rightfully make payment to one holding the same under a duly recorded assignment, and receive the note and cancellation of his mortgage, although he knows that another claims in good faith the right to collect the note. *Castner v. Johnson*, 66 Kan. 404 (71 Pac. Rep. 819). Where one loans money to a large number of borrowers through an agent, and by agreement between himself and such agent the latter takes all loans payable to himself, and indorses the notes to the loaner, and draws a sight draft upon the latter for the amounts needed from time to time to fill applications, and the agent is intrusted with the care, renewal and collection of such loans, such loaner is not a bona fide holder of negotiable paper, and the payment to the agent will be deemed payment to the principal. *Cheshire Provident Inst. v. Fuesner*, 63 Neb. 682 (88 N. W. Rep. 849). To the same effect, see *Cheshire Provident Inst. v. Gibson*, (Neb.) 89 N. W. Rep. 243. That a purchaser of negotiable mortgage securities, which are made payable at the office of the loan company negotiating them, knows that the loan company solicits payment of them regularly as they fall due, and that it interests itself in the payment of taxes and insurance to protect the security, does not make such loan company his agent to collect, nor charge him with the moneys so obtained, where he has no knowledge of any claim of authority from him, or of ownership of the securities, and he retains possession of them, and places them in the hands of another agent with instructions to formally demand payment. *Bradbury v. Kinney*, 63 Neb. 754 (89 N. W. Rep. 257). Where one purchasing a note constitutes his assignor, who is the original payee named therein, his agent for the collection of both interest and principal, and such agent, in the exercise of such authority, does

collect both interest and principal, the holder can not, after the agent's failure to account, repudiate such agency, stand upon his rights as a bona fide holder for value, and collect a second time from the maker, although the latter has paid the agent in the belief that he was still the holder of the note. *Pochin v. Knoebel*, 63 Neb. 768 (89 N. W. Rep. 264). For particular fact cases as to authority of agent to receive payments, see *Corbet v. Waller*, 27 Wash. 242 (67 Pac. Rep. 567); *Fowle v. Outcalt*, 64 Kan. 352 (67 Pac. Rep. 889).

Sec. 481. Release by mistake or without authority. A formal release of a mortgage executed by the mortgagee extinguishes the lien of the mortgage, whether the same is fully paid or not; but if the release is made through inadvertence or mistake, the lien of the mortgage may be reinstated by proper proceedings taken therefor. *Gadsden v. Johnson*, Neb. (91 N. W. Rep. 285). A pledgee of a note and mortgage securing it who procures a release thereof, upon execution of new securities, in ignorance of an intervening mortgage on the same property, may have the original mortgage restored so as to preserve the priority of his lien. *Laconia Sav. Bank v. Vittum*, 71 N. H. 465 (52 Atl. Rep. 848; 93 Am. St. Rep. 561). A release of a trust deed executed by the trustee thereof as to part of the lots embraced in it procured by a purchaser of such lots whose payments were not sufficient to authorize such release of his lots, under a stipulation in the deed authorizing the release of lots separately on payment of specified sums, will be cancelled where it was not authorized by the holders of the notes secured. *Reed v. Jennings*, 196 Ill. 472 (63 N. E. Rep. 1005). Where a grantee of land subject to a mortgage thereon fraudulently obtained an assignment of the mortgage and released the same, the notes secured thereby being unsatisfied, it was held that, as against an indorser of the notes, who was compelled to take up the same because of his liability as such, that the release was unavailing to deprive him of his lien thereon, and a sale of the property could be had to satisfy the debt. *Frerking v. Thomas*, 64 Neb. 193 (89 N. W. Rep. 1005). Satisfaction entered on the record of a mortgage by a mortgagee, after he has sold and delivered the note secured by the mortgage to a third party, will protect a subsequent mortgagee in good faith or bona fide purchaser of the mortgaged premises in case he had no notice at the date of the purchase, or the payment of the consideration, that the debt

was assigned, or was unpaid, or that the release was unauthorized. *Columbia Nat. Bank v. Marshall*, (Neb.) 90 N. W. Rep. 218. For exhaustive collation of authorities on "Right to reinstatement of mortgage when released or discharged by mistake," see 58 L. R. A. 788-807.

Sec. 482. Penalty for failure to enter satisfaction—Statutes construed. A corporation, as such, is not subject to the penalty imposed by Burns' Ind. Rev. Stat., § 1105, upon a "person" whose duty it is to do so, who refuses to release a mortgage of record after it has been fully satisfied. *Studebaker Bros. Mfg. Co. v. Morden*, 159 Ind. 173 (64 N. E. Rep. 594). A purchaser of premises subject to a mortgage, the record of which erroneously describes the debt as less than it actually is, is entitled to a satisfaction of the mortgage upon payment of the amount designated by the record, but he can not recover of the mortgagee the penalty and attorney's fees for failure to release the mortgage, provided by Burns' Ind. Stat., § 1105, until the full amount of the debt actually secured by it has been paid. *Osborn v. Hocker*, 160 Ind. 1 (66 N. E. Rep. 42). The right to recover penalty from mortgagee, under the Miss. Code 1892, § 2451, for his failure to enter satisfaction of a mortgage depends upon a strict compliance with the statute. See opinion for particular facts held not to give the right. *British & American Mortgage Co. v. Burke*, 80 Miss. 643 (32 So. Rep. 51). Utah Rev. Stat., § 2006, subjecting a mortgagee who fails to release a mortgage after satisfaction thereof to an action to compel him to make the proper release, in which judgment may be recovered against him for costs, including a reasonable attorney fee, is held unconstitutional as class legislation on account of the attorney fee provision. *Openshaw v. Halfin*, 24 Utah, 426 (68 Pac. Rep. 138; 91 Am. St. Rep. 796).

Sec. 483. Penalty for failure to enter satisfaction—Release withheld in good faith. The statutory penalty given by Mo. Rev. Stat. 1899, § 4363, for non-satisfaction of record of a deed of trust or mortgage, can not be enforced against a mortgagee, who in good faith believed the debt secured by his mortgage or deed of trust is not due when the tender is made, and when no actual acceptance of the money tendered occurs. *Snow v. Bass*, 174 Mo. 149 (73 S. W. Rep. 630). The penalty provided by Wis. Rev. Stat. 1898, § 2256 for

failure of mortgagee or his assignee to discharge a mortgage after full performance of its conditions, can not be recovered where such release is withheld in good faith on the ground that the payment forming the basis of the right to the release was made to an agent having no authority to receive it. *Schumacher v. Falter*, 113 Wis. 563 (89 N. W. Rep. 485). The court say: "Although that section does not provide, in terms, that the failure to discharge must be a willful or malicious one, it is very evident that it was not enacted to punish honest mistakes. A statute in almost the identical language of our section has been construed many times by the supreme court of Michigan; and the substance of the decisions in that state is that where there is no intentional wrong in the refusal to discharge, but, rather, a reliance in good faith upon some supposed legal right, the penalty will not be imposed, even though the supposed right may be found not to exist. *Myer v. Hart*, 40 Mich. 517 (29 Am. Rep. 553); *Huxford v. Eslow*, 53 Mich. 179 (18 N. W. Rep. 630); *Parkes v. Parker*, 57 Mich. 57 (23 N. W. Rep. 458). In *Burrows v. Bangs*, 34 Mich. 304, Mr. Justice Cooley disposes of a claim to recover such a penalty as follows: 'But as there has been an honest difference between these parties regarding their rights, we do not think the defendant is subject to the statutory penalty for not discharging the mortgage.' The construction so given the statute is very reasonable, and we do not hesitate to abide by it."

Sec. 484. Breach authorizing foreclosure. The fact that a default in the payment of interest gives a mortgagee the right to foreclose does not start the statute of limitations to running in favor of the mortgagor. *First Nat. Bank v. Parker*, 28 Wash. 234 (68 Pac. Rep. 756; 92 Am. St. Rep. 828). *Burns' Ind. Rev. Stat.*, § 1116, providing that "whenever a complaint is filed for the foreclosure of a mortgage upon which there shall be due any interest, or installment of the principal," etc., is held to recognize the right to foreclose a mortgage for default in the payment of interest. *Perry v. Fisher*, 30 Ind. App. 261 (65 N. E. Rep. 935). It is competent for parties to a mortgage or deed of trust to agree that default in payment of the installments of interest shall operate to make the whole debt due and authorize foreclosure; and a mortgagee who has sued to foreclose on account of the mortgagor's default in the payment of an installment of interest does not waive his right

to foreclose by accepting payment of a subsequent installment of interest where it was agreed between the parties, when the payment was tendered and accepted, that "the conditions and equities between them were to remain unchanged and unaffected by this payment." *Curran v. Houston*, 201 Ill. 442 (66 N. E. Rep. 228). For interesting construction of particular note and mortgage held not to give the right of foreclosure for failure to pay interest when due, see *Bank v. Doherty*, 29 Wash. 233 (69 Pac. Rep. 732; 92 Am. St. Rep. 903).

Sec. 485. Foreclosure proceedings—General principles

—**Practice.** A mortgage may be reformed by the correction of a mistake in the description of the property, and foreclosed, in the same action. *District Grand Lodge, No. 7 v. Marx*, 131 Ala. 308 (30 So. Rep. 870). The fact that a mortgagee while foreclosing his mortgage pursued an independent remedy of attachment, contrary to the provisions of Bal. Ann. Wash. Codes & Stat., § 5893, can not be raised in a subsequent action by him to quiet his title to the land acquired under the foreclosure sale. *Rohrer v. Snyder*, 29 Wash. 199 (69 Pac. Rep. 748). Sureties who have given a mortgage as security for a debt, and who claim its release on account of an extension of the time of payment without their consent, may enjoin the foreclosure of the mortgage until the determination of the question of such release. *Smith v. Parker*, 131 N. C. 470 (42 S. S. Rep. 910). Mortgagors who have conveyed the mortgaged premises to a grantee assuming the mortgage have no such interest in the premises as entitles them to complain of a decree rendered in the subsequent foreclosure of the mortgage adjusting the rights of such grantee and one to whom he has conveyed. *Gandy v. Coleman*, 196 Ill. 189 (63 N. E. Rep. 625). A mortgage given to a firm can not be enforced by a new firm succeeding to the business of the old unless such right is acquired by a new contract, although the new firm pursues the same business and is under the same name. *Forst v. Kirkpatrick*, 64 N. J. Eq. 578 (54 Atl. Rep. 554). The fact that an action to foreclose brought by a mortgagee is not revived or disposed of within one year after his death by his administrator, under Bal. Ann. Wash. Codes & Stat., § 4837, does not bar a new action after that time by such administrator. *Overlock v. Shinn*, 28 Wash. 205 (68 Pac. Rep. 436). A single bondholder, or several combined, holding bonds secured by a mortgage given to a trustee, may sue to foreclose the mort-

gage in his or their own name or names, although the mortgage provides for such suit by the trustee, where he refuses to bring the suit except on unjustifiable terms. *Schultz v. Van Doren*, 64 N. J. Eq. 465 (53 Atl. Rep. 815). A mortgagee foreclosing a mortgage is bound to recognize the title resting in a defendant by virtue of his taking as heir of the mortgagor. *Equitable Mortg. Co. v. Finley*, 133 Ala. 575 (31 So. Rep. 985). The fact that a mortgagee puts the mortgage notes in judgment simply changes the form of the debt and does not affect his right of action upon the mortgage. *Hanna v. Kasson*, 26 Wash. 568 (67 Pac. Rep. 271). The rule obtaining in Wisconsin requiring notice to be given to a mortgagor by a mortgagee who elects to declare the whole debt due for certain defaults, under a provision in the mortgage giving him this right, is held to be an equitable rule, and that a mortgagor who has left his usual place of abode without making any provision for the forwarding of his mail, and without giving the mortgagee notice of change of address, waives his right to notice. *Julien v. Model Bldg., L. & Inv. Co.*, 116 Wis. 79 (92 N. W. Rep. 561). For particular case as to granting of supersedeas under the practice in California, see *Bank of Woodland v. Stephens*, 137 Cal. 458 (70 Pac. Rep. 293). Mont. Code Civ. Proc., § 1724 construed and applied—appeal—necessary parties—notice of appeal. *T. C. Power & Bro. v. Murphy*, 26 Mont. 387 (68 Pac. Rep. 411). In Nebraska the plaintiff is required to aver that no suit or proceedings at law has been had to recover the debt or any part thereof, and when this allegation is put in issue by general denial or otherwise, he has the burden of proving it. *Woolworth v. Sater*, 63 Neb. 418 (88 N. W. Rep. 682); *Hedblom v. Pierson*, (Neb.) 90 N. W. Rep. 218; *Drury v. Roberts*, (Neb.) 89 N. W. Rep. 600. This allegation need not be proved beyond possibility of inference to the contrary; it is enough where no evidence appears to dispute it, if the plaintiff make a prima facie case. *President, etc. of Ins. Co. of North America v. Parker*, 64 Neb. 411 (89 N. W. Rep. 1040). For particular cases as to sufficiency of evidence on this point, see *Massachusetts Mut. Life Ins. Co. v. Smith*, (Neb.) 89 N. W. Rep. 595; *Woolworth v. Sater*, 63 Neb. 418 (88 N. W. Rep. 682). Neb. Code Civ. Proc., § 677 construed and applied—appeal—requisites of supersedeas bond. *Collins v. Brown*, 64 Neb. 173 (89 N. W. Rep. 754). N. J. Gen. Stat., pp. 2211, 2212, requiring a mortgage securing a bond to be foreclosed before suit may be brought on the

bond is not applicable unless the property mortgaged is within the state. *Colton v. Salomon*, 67 N. J. L. 73 (50 Atl. Rep. 588). N. Y. Code Civ. Proc., §§ 1628, 1630 construed and applied—prohibition of other action to recover debt pending foreclosure of mortgage. *Reichert v. Stilwell*, 172 N. Y. 83 (64 N. E. Rep. 790). In Wisconsin a foreclosure action is regulated by statute, and Rev. Stat., 1898, §§ 3154, 3162, which govern the subject, do not contemplate any provision for a sale of the mortgaged property for the purpose of providing funds to reimburse the mortgagee for expenditures necessarily made by him between the date of the judgment and the day of sale to protect the property from tax liens. *Sands v. Kaukauna Water Power Co.*, 115 Wis. 229 (91 N. W. Rep. 679).

Sec. 486. Complaint in foreclosure proceedings. In Nebraska the petition must allege whether any proceedings at law have been had for the recovery of the debt, or any part thereof; and, where the answer is a general denial, there can be no recovery in the absence of proof sustaining such allegation. *Drury v. Roberts*, (Neb.) 89 N. W. Rep. 600; *Woolworth v. Sater*, 63 Neb. 418 (88 N. W. Rep. 682); *Hedbloom v. Pierson*, (Neb.) 90 N. W. Rep. 218. As a general proposition, a bill to foreclose a mortgage is not demurrable for failure to set out in exact words the mortgage and notes sued on. It is held that a bill showing on its face that the principal note secured by a trust deed has not matured in accordance with its terms, but alleging the right in the complaint to declare it due under the option granted him in the trust deed, and that he does so declare it due, is demurrable, the trust deed not being attached to or set out in the bill. *Jocelyn v. White*, 201 Ill. 16 (66 N. E. Rep. 327). A bill to foreclose a second mortgage which alleges that the person named in the first mortgage as mortgagee was not the real mortgagee, but that the loan was made by a certain defendant to whom the mortgage in fact belonged and to whom the premises were afterward conveyed in satisfaction of the debt, and which asks that the first mortgage be declared extinguished and that the second mortgage be decreed a first lien and foreclosed as such, is not demurrable on the ground that it states two causes of action. *Herman v. Felthousen*, 114 Wis. 423 (90 N. W. Rep. 432). Particular allegations in complaint held sufficient to show that the note secured by mortgage was due. *Luddy v. Pavkovich*, 137 Cal. 284 (70 Pac. Rep. 177). Particular complaint held

sufficient with reference to allegations, as to amount due and assignment of note and mortgage, *Penrose v. Winter*, 135 Cal. 289 (67 Pac. Rep. 772); *Guthrie v. Treat*, Neb. (92 N. W. Rep. 595); description of premises, *Caston v. McCord*, 130 Ala. 318 (30 So. Rep. 431).

Sec. 487. Parties to foreclosure proceedings. Where it appears in an action to foreclose brought by an assignee of a mortgage that he has only an equitable title on account of the assignment not being attested or acknowledged, as provided by statute (Ala. Code, §§ 982, 984), the assignors are necessary parties. *Langley v. Andrews*, 132 Ala. 147 (31 So. Rep. 469). Persons claiming title under a deed by a grantor who executed a mortgage of the land to another before such deed was recorded, but which was recorded before a suit to foreclose the mortgage, are necessary parties to such suit. *Goodwin v. Tyrrell*, Ariz. (71 Pac. Rep. 906). If promissory notes be given to one person, and a mortgage securing them be given to another, who by the terms of the latter instrument is given active powers and authority over the subjects of the mortgage relation, the mortgagee is a necessary party to a suit brought by the payee of the notes to foreclose the mortgage. *Swenny v. Hill*, 65 Kan. 826 (70 Pac. Rep. 868). A mortgagor, who has conveyed lands by an unconditional deed of general warranty, is entitled to intervene for the purpose of pleading usury in an action to foreclose the mortgage. *Pitman v. Ireland*, 64 Neb. 675 (90 N. W. Rep. 540). An administrator with the will annexed, whose rights have not been established by any judgment or decree, can not be admitted as a defendant in a foreclosure suit to deny the validity of the mortgage, as having been created under a mistaken and unlawful exercise of a power given by the will, but his remedy is to file his own bill of complaint. N. J. Eq. (54 Atl. Rep. 859). Construing and applying Ky. Stat., § 2135, denying a wife dower in the lands of her husband sold to satisfy a lien created by a conveyance in which she joined, except as to the surplus not disposed of by him during his life time, it is held that the wife is not a necessary party to an action to foreclose a mortgage on her husband's land in the execution of which she had joined. *Burnam, C. J. and O'Rear, J., dissenting. Morgan v. Wickliffe*, Ky. (72 S. W. Rep. 1122; 24 Ky. Law Rep. 2104). In a former opinion in this case (70 S. W. Rep. 680; 24 Ky. Law Rep. 1039) which is

withdrawn, the contrary was held. See this opinion for collation of authorities on this subject. Applying 1 Bal. Ann. Wash. Codes & Stat., § 4640, providing that the title to the lands of a decedent shall vest immediately in his heirs or devisees, subject to his debts, it is held that the heirs of a mortgagor are indispensable parties to an action to foreclose the mortgage instituted after his death. *Anrud v. Scandinavian-American Bank*, 27 Wash. 16 (67 Pac. Rep. 364).

Sec. 488. Defenses to foreclosure proceedings. A mortgage executed by an administrator to pay debts of his decedent, in pursuance of a judicial decree, can not be questioned on the ground that the debts were not those of the decedent. *Grubbs v. Galloway*, 203 Pa. St. 236 (52 Atl. Rep. 176; 93 Am. St. Rep. 764). Upon foreclosure by the assignees of a mortgage assigned by the mortgagee partly to himself as administrator and partly to a third party, the mortgagor can not set off claims against the mortgagee personally which have accrued subsequent to the assignment. *Hopper v. Williams*, 95 Md. 734 (51 Atl. Rep. 167). It is no defense to a suit brought by a mortgagee to foreclose a mortgage taken by her for full value and without any notice of a defect in the mortgagor's title, that a third person subsequently has obtained a decree against the mortgagor annulling his title for fraud, by an action to which the mortgagee was not made a party. *Slack v. John*, 63 N. J. Eq. 126 (51 Atl. Rep. 151). An allegation by mortgagors in their answer to a bill to foreclose that they "executed" the mortgage is not an admission of their waiver of homestead by a valid and effectual acknowledgment, where they also alleged that they "did not, in and by said mortgage, release or waive their right of homestead." *Ogden Bldg. & L. Ass'n v. Mensch*, 196 Ill. 554 (63 N. E. Rep. 1049; 89 Am. St. Rep. 330). One made a defendant on the plaintiff's allegation that he claims some interest in and to the mortgaged premises which is subordinate to the plaintiff's claim, may show the extinguishment of the plaintiff's lien without establishing his own. *Hill v. Whale Min. Co.*, 15 S. Dak. 574 (90 N. W. Rep. 853). Where a lender of money accepts an application for a loan from a broker employed by a mortgagor to procure it for the purpose of paying off a prior mortgage on the same property, and gives him a check for the amount upon the assurance that the mortgage to be given him would be a first mortgage, and the mortgagor executes the new bond and

mortgage, which are subsequently delivered, and intrusts to the broker the application of the fund to the payment of the prior mortgage, such mortgagor must bear the loss of the broker's failure to so apply the money, and can not set up his appropriation of the money to his own use as a defense to the mortgage. *Henken v. Schwicker*, 174 N. Y. 298 (66 N. E. Rep. 971). In Pennsylvania, an affidavit of defense to a scire facias on a mortgage which denies the indebtedness, but fails to deny the execution of the mortgage, is insufficient to prevent judgment. *Stewart v. Linton*, 204 Pa. St. 207 (53 Atl. Rep. 744). Applying the rule prevailing in Alabama that the statute of limitations may bar the remedy for collecting at law, but it does not extinguish the debt or bar the right to foreclose, it is held that the plea of a judgment in favor of the defendant rendered in a previous action against him for the mortgage debt, in which there was interposed the plea of the general issue, of payment, and of the statute of limitations, is insufficient where it is not alleged that the verdict was not founded upon the plea of the statute of limitations. *Dobson v. Hurley*, 129 Ala. 380 (30 So. Rep. 598).

Sec. 489. Usury as a defense to foreclosure proceedings. A statute (Mo. Rev. Stat. 1889, § 5976) imposing a penalty on usury can not be given an extra-territorial effect. *Crebben v. Delony*, 70 Ark. 493 (69 S. W. Rep. 312). The right given a mortgagor by the law of Maryland to have usurious interest paid applied on the mortgage debt is not waived by consenting in his answer to a decree for the sale of the property. *New York Security & T. Co. v. Davis*, 96 Md. 81 (53 Atl. Rep. 669). The obligor in a mortgage note given for the repayment of money paid out for him by the payee as surety, may avail himself of the defense that the debt paid by the surety embraced usury, unless it appears that he acquiesced in the surety paying the debt in ignorance of that fact. *Paynter, White & Hobson, JJ.*, dissenting. *Blakeley v. Adams*, Ky. (68 S. W. Rep. 473; 24 Ky. Law Rep. 324). The usury laws of Missouri govern a note made payable in that state upon foreclosure of a mortgage upon lands in Arkansas given to secure it. *Crebben v. Delony*, 70 Ark. 493 (69 S. W. Rep. 312). The grantee of a mortgagor who assumes the payment of the mortgage can not set up the defense of usury. *Anderson v. Oregon Mortg. Co.*, Ida. (69 Pac. Rep. 130); *Frost v. Pacific Sav. Co.*, 42 Or. 44 (70

Pac Rep. 814); *Irwin v. Washington Loan Ass'n*, 42 Or. 105 (71 Pac. Rep. 142). Particular plea of usury held insufficient. *Clark v. Johnson*, 133 Ala. 432 (31 So. Rep. 960). Particular evidence held to sustain the defense of usury. *Leipzigler v. Van Suan*, 64 N. J. Eq. 37 (53 Atl. Rep. 1).

Sec. 490. Statute of limitations. Where the mortgage debt is evidenced by several notes the statute of limitations applies to each note as it matures. *George v. Butler*, 26 Wash. 456 (67 Pac. Rep. 263; 57 L. R. A. 396; 90 Am. St. Rep. 756). The statute of limitations begins to run against an action to foreclose a mortgage given a surety on notes, to secure him from liability, when he pays or takes up the notes. *Loewenthal v. Coonan*, 135 Cal. 381 (67 Pac. Rep. 324; 87 Am. St. Rep. 115). A security deed which does not refer in any way to the debt to secure which it was given, or furnish any evidence of its existence, can not be foreclosed as an equitable mortgage, and a money judgment obtained thereon, if the obligation secured by the deed is barred by the statute of limitations. *Duke v. Story*, 116 Ga. 388 (42 S. E. Rep. 722). In Kansas it is held that the statute of limitations can not be interposed against the foreclosure of a mortgage on a homestead given by a husband and wife to secure their joint note, so long as the right of action to recover the debt may be maintained against either of them, although such action is barred as to the other. *Investment Securities Co. v. Manwarren*, 64 Kan. 636 (68 Pac. Rep. 68). Applying the same principle, it is held that the foreclosure of a mortgage on land the title to which is held by the wife, given to secure the joint note of her and her husband, can not be refused because the debt as to her is barred by the statute of limitations. *Cooper v. Haythorn*, 66 Kan. 91 (71 Pac. Rep. 277). One made a defendant to an action to foreclose on an allegation that he claims some interest in or lien upon the premises, the nature of which is unknown to the plaintiff, but which is junior to his mortgage, can not by demurrer set up the statute of limitations. *Lincoln Mortg. & T. Co. v. Parker*, 65 Kan. 819 (70 Pac. Rep. 892). Citing, *Corbey v. Rogers*, 152 Ind. 169 (52 N. E. Rep. 748); *Church Election Fund of General Assembly of Presbyterian Church v. First Presbyterian Church of Seattle*, 19 Wash. 455 (53 Pac. Rep. 671); *Blair v. Silver Peak Mines*, (C. C.) 84 Fed. Rep. 737. In Nebraska a mortgage on real estate continues a lien thereon for ten years only from the

maturity of the debt secured; and if the debt secured is payable in installments, the mortgage can not be enforced as security for any installment due and payable ten years or more prior to the commencement of the action to foreclose. *Nares v. Bell*, Neb. (92 N. W. Rep. 571). In Vermont it is held that a note secured by mortgage on real estate is within the provisions of the statute of limitations that actions of assumpsit founded on a contract or liability, expressed or implied, shall be commenced within six years after the cause of the action accrues, and not after. *Houghton v. Tolman*, 74 Vt. 467 (52 Atl. Rep. 1032). The statute of limitations as to the right of action on a mortgage is not extended by the mortgagee taking judgment against the mortgagor on the mortgage notes. *Hanna v. Kasson*, 26 Wash. 568 (67 Pac. Rep. 271). A payment on a note to secure which an equitable mortgage was given, after both have been barred by the statute of limitations, revives them as between the original holders. *Ewbank v. Ewbank*, 64 S. C. 434 (42 S. E. Rep. 194). A distinct acknowledgment in writing of the existence of a mortgage operates to set a new date for limitations to run from as to the mortgage, though there was no promise to pay the mortgage debt. *Foster v. Bowles*, 138 Cal. 346 (71 Pac. Rep. 494). Particular letter held not to be such an acknowledgment of debt as will toll the statute. *Wood v. Marietta*, 66 Kan. 748 (71 Pac. Rep. 579). Where, before the original note secured by a mortgage is barred by the statute of limitations, a new note is given for the debt to the holder of the original note, it has the effect of initiating a new period for the statute of limitations. *Wilcox v. Gregory*, 135 Cal. 217 (67 Pac. Rep. 139). Ark. Laws 1887, p. 175; Laws 1889, p. 74, construed and applied—limitation on action to foreclose mortgage. *Goodman v. Pareira*, 70 Ark. 49 (66 S. W. Rep. 147).

Sec. 491. Judgment in foreclosure proceedings—
Force and effect. A decree of foreclosure divesting all of an owner's interest in a building is a bar to a subsequent suit by him to establish an easement in the building alleged to have existed at the time of the foreclosure suit and which could have been adjudicated therein. *Springer v. Darlington*, 198 Ill. 121 (64 N. E. Rep. 709). In Texas the court can not render a judgment foreclosing the lien of a mortgage on a verdict by a jury finding for the plaintiff in a certain sum, omitting all reference to the lien, they having been instructed that if they

found for the plaintiff the form of their verdict should be: "We, the jury, find for plaintiff the sum of ———dollars, with a foreclosure of its mortgage lien." *Ablowich v. Greenville Nat. Bank*, 95 Tex. 429 (67 S. W. Rep. 79). A mortgagee of land, holding an invalid certificate of purchase, on account of an attempted sale for taxes duly assessed against said land after the execution of his mortgage, who forecloses his mortgage without setting up his claim for taxes, can not afterwards enforce such claim for taxes in a subsequent action against the mortgaged premises, by himself or through his assignee; the premises then being held by or through a purchaser under the decree of foreclosure. *Dixon v. Eikenberry*, 161 Ind. 311 (67 N. E. Rep. 915).

Sec. 492. Personal and deficiency judgment on foreclosure of mortgage. The circuit courts of the United States in equity have jurisdiction in a foreclosure suit to award a personal judgment for a deficiency in any case. *Grant v. Winona & S. W. Ry. Co.*, 85 Minn. 422 (89 N. W. Rep. 60). Neb. Laws 1897, p. 378, repealing Code Civ. Proc., §§ 847, 849, commonly known as the "Deficiency Judgment Law," does not affect a plaintiff's right to a deficiency judgment in an action pending at the time of the passage of the statute, or on a cause of action already accrued but not in suit at that time. *Merrill v. Miller*, (Neb.) 89 N. W. Rep. 606; *Brayton v. Oaks*, (Neb.) 89 N. W. Rep. 646; *Harris v. Nye & Schneider Co.*, (Neb.) 91 N. W. Rep. 250; *Wolff v. Phelps*, (Neb.) 92 N. W. Rep. 143. For a discussion of the effect on deficiency judgments of the repeal of Neb. Code Civ. Proc., § 847, and the rules governing such judgments in that state, see *Patrick v. National Bank of Commerce*, 63 Neb. 200 (88 N. W. Rep. 183). Where a mortgage given to secure railroad bonds contains a covenant with the trustee to pay the bonds, and stipulates for the personal liability of the mortgagor for the payment of the bonds, and for the enforcement of any deficit after the trustee had exhausted the security, the trustee is authorized to represent the bondholders in a foreclosure suit, and to take a personal judgment for their benefit for the deficiency after exhausting the security. *Grant v. Winona & S. W. Ry. Co.*, 85 Minn. 422 (89 N. W. Rep. 60). Citing, 5 Thomp. Corp. § 6126; *Short, Ry. Mortg.* § 483; *Shaw v. Railroad Co.*, 100 U. S. 605 (25 L. Ed. 757); *Richter v. Jerome*, 123 U. S. 233

(8 Sup. Ct. Rep. 106; 31 L. Ed. 132); *Beals v. Railroad Co.*, 133 U. S. 290 (10 Sup. Ct. Rep. 314; 33 L. Ed. 608). Where a bill to foreclose a trust deed prays for an accounting and that defendant be decreed to pay whatever sum shall be found to be due, and a cross bill prays for a cancellation of the deed, the court may give a personal judgment for the debt, and decree a cancellation of the deed upon payment of the judgment. *Bourke v. Hefter*, 202 Ill. 321 (66 N. E. Rep. 1084). In an action to foreclose a mortgage, after the proceeds of the sale of the mortgaged premises have been exhausted, the court can not award execution or render judgment for any balance due against a person who has assumed and agreed with the mortgagor to pay the mortgage debt, unless the plaintiff elects to avail himself of the agreement to assume and pay, and alleges the same against the person assuming the mortgage debt, and the latter has been summoned to answer such claim. *Southward v. Jamison*, 66 O. St. 290 (64 N. E. Rep. 135). See opinion for discussion of when personal judgment will be given against mortgagor without prayer therefor in the petition. The fact that one of the notes secured by a mortgage is outlawed so that no personal action could be maintained thereon at the time of the commencement of the foreclosure proceedings does not give defendants liable for a deficiency judgment the right to have it excluded from the benefit of the proceeds of the sale, but they should be ratably distributed on all the notes, and deficiency judgment given for the amount remaining due on the two notes not barred. *Patrick v. National Bank of Commerce*, 63 Neb. 200 (88 N. W. Rep. 183).

Sec. 493. Allowance of attorney's fees in foreclosure proceedings. Upon foreclosure of a mortgage, authorized by its terms, for breach of the mortgagor's covenant to keep the premises insured, the mortgagee may recover an allowance of attorney's fees provided for in the mortgage. *Uedelhofen v. Mason*, 201 Ill. 465 (66 N. E. Rep. 364). A stipulation in a mortgage bond given to an insurance company, for the payment of a certain per cent. as attorney's fees in case of default in making the payments as specified, does not authorize the recovery of such attorney's fees in foreclosure brought on account of the bond having matured by reason of the insolvency of the mortgagee, and not through any default of the mortgagor. *Union Trust Co. v. Shilling*, 30 Ind. App. 543 (66

N. E. Rep. 699). An agreement in a mortgage to pay an attorney's fee in the event of a sale by mortgagee, under a power contained in the mortgage, does not entitle the mortgagee's attorney to a fee out of the mortgaged property upon a sale ordered by the court upon an action to settle the estate of the mortgagor's ancestor, to which the mortgagee was made a defendant. *Walker v. Killian*, 62 S. C. 482 (40 S. E. Rep. 887). Where the description of a note executed by a vendee for purchase money, given in the deed executed to him and a deed of trust executed by him to secure such notes, makes no reference to a stipulation in it for the payment of attorney's fees, a lien for such fee can not be asserted against a subsequent purchaser of the land who had no notice of such stipulation. *Hall v. Read*, 28 Tex. Civ. App. 18 (66 S. W. Rep. 809). In California an allowance of attorney's fees may be included in the lien of the mortgage, where it specifies that such fees are to be regarded as part of the costs of foreclosure; but where the mortgage merely provides for an allowance of attorney's fees the judgment entered therefor is personal. *Haensel v. Pacific States Sav. & L. & Bldg. Co.*, 135 Cal. 41 (67 Pac. Rep. 38). In support of the last proposition, see, also, *Loewenthal v. Coonan*, 135 Cal. 381 (67 Pac. Rep. 1033; 87 Am. St. Rep. 115); *Luddy v. Pavkovich*, 137 Cal. 284 (70 Pac. Rep. 177). As to the power of the court in making allowance of attorney's fees, see *Hellier v. Russell*, 136 Cal. 143 (68 Pac. Rep. 581).

Sec. 494. Appointment of receiver in foreclosure proceedings. A receiver may be appointed where there is an uncontradicted verified application therefor averring that the property is insufficient security for the sum due. *Chambers v. Barker*, (Neb.) 89 N. W. Rep. 388. A proper showing being made, a court may appoint a receiver pending the perfection of an appeal from its order confirming a foreclosure sale of the mortgaged property. *Buck v. Stuben*, 63 Neb. 273 (88 N. W. Rep. 483). Ordinarily a receiver will not be appointed in proceedings to foreclose a mortgage when the mortgage property is the homestead of the mortgagor and therefore not subject to the claims of a general creditor. *Sanford v. Anderson*, (Neb.) 92 N. W. Rep. 152. It is error to appoint a receiver in an action to foreclose a mortgage given on crops by a tenant, on an application by complainant alleging that the landlord by collusion with the tenant was attempt-

ing to gain possession of the crops under a pretended lien in his favor which was junior to the mortgage, where the landlord is solvent and it appears that no notice of the application was given. *Meyer v. Thomas*, 131 Ala. 111 (30 So. Rep. 89). A mortgagee who is not entitled to the rents and profits during the period of redemption is not entitled to the appointment of a receiver after foreclosure merely on showing that the security is inadequate and that the mortgagor is unable to farm and manage the property, there being nothing to show that he would commit waste or that his possession would depreciate the value of the property. *De Bois v. Bowles*, Colo. (69 Pac. Rep. 1067). Where it is alleged in proceedings to foreclose a mortgage, pledging the rents, issues and profits of the property as security, that the real estate is scant security and a deficiency judgment is given, the court may, by subsequent decree, appoint a receiver for the rents and profits without regard to the solvency of the mortgagor. *Ball v. Marske*, 202 Ill. 31 (66 N. E. Rep. 845). A court which renders a decree of foreclosure after a sale of the mortgaged premises for less than the amount of the judgment has authority to appoint a receiver to collect and keep, for the further order of the court, the rents accruing during the year allowed for redemption, as against the owner of the property sold. *Russell v. Bruce*, 159 Ind. 553 (64 N. E. Rep. 602). Rents and profits in the hands of a receiver appointed on the foreclosure of a junior mortgage, collected during the period of redemption, belong to the owner of the equity of redemption after the payment of a deficiency decree and the charges allowed by the court, and can not be applied by him to the payment of taxes and interest on the prior mortgage. *Stevens v. Hadfield*, 196 Ill. 253 (63 N. E. Rep. 633). Where, in foreclosure proceedings brought by a senior mortgagee, a receiver is appointed on the application of the junior mortgagee, and the senior mortgagee purchases the property, subject to the lien for taxes, for an amount not sufficient to satisfy his mortgage, he is entitled, as against the junior mortgagee, to have the funds derived from the receivership applied to the deficiency, but not to the payment of the taxes. *New Jersey Title Guarantee & T. Co. v. Cone*, 64 N. J. Eq. 45 (53 Atl. Rep. 97). As to the appointment of a receiver on application of a second mortgagee, see *Anderson v. Riddle*, 10 Wyo. 277 (68 Pac. Rep. 829). A court of equity will not appoint a receiver simply because such appointment is stipulated for in

the mortgage, but where a deed of trust contains a specific pledge of the rents and profits and a stipulation for the appointment of a receiver, the appointment of a receiver pending foreclosure will be upheld, where it is uncertain whether the property will bring an amount sufficient to satisfy the debt, and the mortgagors have failed to keep their agreement to keep the building, in which the property chiefly consisted, insured, and had suffered interest due and unpaid to accumulate to a large amount, especially where they were permitted by the order to retain possession of a certain part of the premises for a homestead, and other parts to be rented for their necessary support. *Bagley v. Illinois Trust & Sav. Bank*, 199 Ill. 76 (64 N. E. Rep. 1085).

Sec. 495. Counterclaims, cross bills and adjudication of adverse claims of third parties in foreclosure proceedings. In an action to foreclose an absolute deed declared to be a mortgage, the defendant may counterclaim damages for the plaintiff's prior wrongful detention of the premises, under *Bal. Ann. Wash. Codes & Stat.*, § 4913. *First Nat. Bank v. Parker*, 28 Wash. 234 (68 Pac. Rep. 756; 92 Am. St. Rep. 828). Applying *Cal. Code Civ. Proc.*, §§ 389, 442, 726, it is held that one having a prior mortgage on a tract of land, who is made a defendant to an action to foreclose a mortgage on an undivided half interest therein, may file a cross bill making a mortgagee of the other undivided half interest a party defendant, and thereby make the decree rendered in the action binding on him. *Newhall v. Bank of Livermore*, 136 Cal. 533 (69 Pac. Rep. 248). A defendant who files a cross complaint seeking to foreclose a mortgage held by him, and for which he claims priority, occupies the same position with reference to the right to dismiss as an original plaintiff, and, under *Cal. Code Civ. Proc.*, § 581, can not dismiss his cross complaint without the consent of the plaintiff in the action. *Rodgers v. Parker*, 136 Cal. 313 (68 Pac. Rep. 975). A decree foreclosing a mortgage on land rendered against one holding a certificate of tax sale therefor, who has been made a party and defaulted, bars only his right to redeem and does not affect his right to a tax deed which is superior to the mortgage. *Browne v. Kiel*, 117 Ia. 316 (90 N. W. Rep. 624).

Sec. 496. Rights of junior incumbrancers. The only effect of the failure to make a junior mortgagee a party to

proceedings to foreclose the senior mortgage is to leave him with an equity of redemption from the senior mortgagee, or from his successor in title. *Capehart v. McGahey*, 132 Ala. 334 (31 So. Rep. 503). A junior mortgagee whose right to recover against his mortgagor is barred by the statute of limitations has neither a right to redeem nor a defense to an action to quiet title by a senior mortgagee claiming title under his own foreclosure. *Donald v. Stybr*, 65 Kan. 578 (70 Pac. Rep. 650). A junior mortgagee whose rights are known and who is not made a party to the foreclosure of a prior lien has an absolute right to redeem by payment of the amount of the prior incumbrance with interest. He is not required to pay the costs of the foreclosure suit, to which he was not a party. *Jones v. Dutch*, (Neb.) 92 N. W. Rep. 735. Citing, in support of the last statement, *Vroom v. Ditmar*, 4 Paige, 526; *Gage v. Brewster*, 31 N. Y. 218; *Moore v. Cord*, 14 Wis. 213; *Hosford v. Johnson*, 74 Ind. 479. A junior mortgagee, who has not been made a party to a suit to foreclose a first mortgage, is entitled to claim and receive any money from a foreclosure sale and remaining in the sheriff's hands after the first mortgage has been satisfied. But if such junior mortgagee is permitted to redeem the land, and does in fact redeem it, the purchaser is subrogated to his rights under the mortgage, and may claim the fund upon which such mortgage is a lien. *Milligan v. Gallen*, 64 Neb. 561 (90 N. W. Rep. 541). A purchaser at a foreclosure sale or his assignee may maintain an action to foreclose the lien of a prior incumbrancer not made a party to the foreclosure proceedings, and to compel him to redeem. *Kelley v. Houts*, 30 Ind. App. 474 (66 N. E. Rep. 408). A judgment lien creditor, who is a party to a suit to foreclose a prior mortgage, and who comes in by answer or cross complaint, and sets up the judgment, and obtains a decree that the proceeds of the sale, after satisfying prior liens, shall be applied in payment of his judgment, can not have the mortgaged premises resold under execution issued in the law action for any deficiency due him on his judgment, when the land had been redeemed by a grantee of the mortgagor, who takes subsequent to the rendition of the foreclosure decree. *Williams v. Wilson*, 42 Or. 299 (70 Pac. Rep. 1031; 95 Am. St. Rep. 745). Upon a sale had under a decree foreclosing a first mortgage to which the holder of the second mortgage was made a party and served by publication, but did not appear, and which barred her equity of redemption, it is held that

the lien of the second mortgage was transferred to the surplus remaining after the satisfaction of the first mortgage and costs, but that her right thereto did not accrue until her mortgage was foreclosed and the amount due thereon judicially determined, and the statute of limitations would not commence to run in favor of those who had wrongfully converted the fund until such foreclosure was had. *Robertson v. Brooks*, Neb. (91 N. W. Rep. 709).

Sec. 497. Marshalling securities—Rule where portions of the mortgaged premises have been conveyed. One taking a lease subject to a mortgage, who expends money on the premises in carrying out the purposes and conditions of his lease, upon being made a party to the foreclosure of the mortgage, is entitled to have the mortgagee exhaust other property embraced in the mortgage before enforcing it against the leased premises. Cal. Civ. Code, § 2899, applied. *Mack v. Shafer*, 135 Cal. 113 (67 Pac. Rep. 40). The right of a widow who has joined her husband in the execution of a trust deed on lands held by him in fee to have his interest sold first on foreclosure, can only be asserted in the foreclosure proceedings. *Campbell v. Wilson*, 195 Ill. 284 (63 N. E. Rep. 103). A grantee of a part of mortgaged premises, whose deed states that it is made subject to the mortgage, has no equity against the mortgagor that the portion of the land retained by him shall be sold first on foreclosure. *Monarch Coal & Min. Co. v. Hand*, 197 Ill. 288 (64 N. E. Rep. 381). The right of a junior mortgagee to have lands, covered by senior mortgages, sold in the inverse order of their alienation, is destroyed by the foreclosure of a senior mortgage and their sale to a third party, no notice of the equity of the junior mortgagee having been averred or proven. *Threefoot v. Hillman*, 130 Ala. 244 (30 So. Rep. 513; 89 Am. St. Rep. 39).

Sec. 498. Sale under decree of foreclosure—Appraisement of property—Nebraska cases. All objections to the appraisement of property not founded on fraud, to be available, must be made before the sale. *Mercantile Co-operative Bank v. Schaaf*, (Neb.) 89 N. W. Rep. 990; *Unland v. Crane*, 63 Neb. 451 (88 N. W. Rep. 667); *Farmers' & Merchants' State Bank v. Thornburg*, 64 Neb. 76 (89 N. W. Rep. 626); *Wells v. Frazier*, 64 Neb. 370 (89 N. W. Rep. 1033); *Phoenix Mut. Life Ins. Co. v. Williams*, (Neb.) 90 N. W. Rep. 756. An appraisement

can not be successfully assailed on the ground that the appraisers were mistaken in their valuation of the property. *Cole v. Willard*, 62 Neb. 839 (88 N. W. Rep. 134); *Waite v. Malchow*, 63 Neb. 650 (88 N. W. Rep. 863); *Peck v. Starks*, 64 Neb. 341 (89 N. W. Rep. 1040). A deputy sheriff may assist in the appraisement of lands sold under an order of sale issued in pursuance of a decree of foreclosure addressed to the sheriff. *Young v. Wood*, 63 Neb. 291 (88 N. W. Rep. 528); *Wells v. Frazier*, 64 Neb. 370 (89 N. W. Rep. 1033); *Union Trust Co. v. King*, (Neb.) 91 N. W. Rep. 190; *Richardson v. Hahn*, 63 Neb. 294 (88 N. W. Rep. 527). See opinion in last case cited as to sufficiency of recitals in appraisement made by deputy. An appraisement of the interests of defendants against whom a decree of sale operates is not invalidated because the names of the owners of the equity of redemption are not stated other than by the designation "et al," after the name of the principal defendant in the action. *Wells v. Frazier*, 64 Neb. 370 (89 N. W. Rep. 1033); *Union Trust Co. v. King*, (Neb.) 91 N. W. Rep. 190. Where an appraisement is made by qualified persons having knowledge of the value of the land it is not necessary that the appraisement be made in actual view of the premises. *Reynolds v. Fagan*, (Neb.) 89 N. W. Rep. 170; *Iowa Loan & T. Co. v. Devall's Estate*, 63 Neb. 826 (89 N. W. Rep. 381). The failure of appraisers to examine the interior of a house on the premises does not of itself show fraud on their part. *Levy v. Hinz*, (Neb.) 90 N. W. Rep. 640. A husband living on land to which his wife holds the title, and which is jointly occupied by them as a homestead, is a freeholder, within the meaning of Neb. Code Civ. Proc., § 491a, requiring an appraiser of real estate to be a freeholder. *Salisbury v. Murphy*, 63 Neb. 415 (88 N. W. Rep. 764). An appraisement is signed, within the meaning of Neb. Code Civ. Proc., § 491a, when it is attested by the mark of an illiterate person, whose name is subscribed thereto by another. *Iowa Loan & T. Co. v. Greenman*, 63 Neb. 268 (88 N. W. Rep. 518). Appraisers are not required to set out in their return the evidence upon which they acted in making the appraisement. *Omaha Land & T. Co. v. Keck*, 63 Neb. 266 (88 N. W. Rep. 520). As no deduction of taxes and other liens from the appraisement, see *Beck v. McKibben*, 63 Neb. 413 (88 N. W. Rep. 765); *Curtis v. D. M. Osborne & Co.*, 63 Neb. 837 (89 N. W. Rep. 420); *Fraaman v. Fraa-*

man, 64 Neb. 472 (90 N. W. Rep. 245); *Levy v. Hinz*, (Neb.) 90 N. W. Rep. 640. The War Revenue Act of 1898 does not require the attaching of a revenue stamp to the certificate of appraisal. *Noble v. Citizens' Bank of Geneva*, 63 Neb. 847 (89 N. W. Rep. 400); *Moultham v. Apking*, 64 Neb. 378 (89 N. W. Rep. 1051). A second appraisalment is not authorized until the property has been advertised and twice offered for sale and not sold for want of bidders, unless the appraisalment as made is for some valid reason vacated by the trial court. *Thompson v. Purcell*, 63 Neb. 445 (88 N. W. Rep. 778); *Lombard v. Pasusta*, (Neb.) 89 N. W. Rep. 255. A finding of the court, on the objection that the appraisalment of property sold at judicial sale is too low, based on a conflict of evidence, will not be disturbed or reviewed unless the evidence clearly shows that there was fraud in the appraisalment. *Sanborne v. Lindley*, 63 Neb. 692 (88 N. W. Rep. 869). To the same effect is the case of *Williams v. Taylor*, 63 Neb. 717 (89 N. W. Rep. 261). Neb. Code Civ. Proc., § 491d construed and applied—filing copy of appraisalment with clerk "forthwith." *Hubbard v. Hennessey*, (Neb.) 90 N. W. Rep. 220; *Northwestern College v. Shreck*, (Neb.) 89 N. W. Rep. 289.

Sec. 499. Notice of sale. A sale will not be vacated merely because the notice of sale does not correctly state the date the decree was rendered, where the notice with otherwise sufficient accuracy described the decree under which the sale was made. *Mead v. Hoover*, 63 Neb. 419 (88 N. W. Rep. 655). The failure of a notice of sale to state, or its erroneous statement of, the meridian in which lands are situated will not invalidate a sale where the remaining parts of the description are sufficiently definite and certain to enable the land to be located. *Cross v. Leidich*, 63 Neb. 420 (88 N. W. Rep. 667); *Salisbury v. Murphy*, 63 Neb. 415 (88 N. W. Rep. 764). It is proper for the notice to state the amount of the decree, but such statement is not essential to the validity of the notice. *Bourke v. Somers*, (Neb.) 92 N. W. Rep. 990. Construing and applying Neb. Code Civ. Proc., § 497, providing that notice of the time and place of sale shall be given for at least 30 days before the day of sale, it is held that where the notice is first published at least 30 days before the sale, and its publication is continued in each successive issue of the paper between the first insertion and the day of sale, the law is satisfied,

and the notice is valid. *Mallory v. Patterson*, 63 Neb. 429 (88 N. W. Rep. 686).

Sec. 500. Time, place and manner of sale—Sale in parcels or in solido. A master authorized to fix the time of the sale has implied power to fix the place of sale. A court which has entered a foreclosure decree directing a master to sell the mortgaged property and authorizing him to adjourn the sale may, after notice of the time and place of the sale has been given, enter an order authorizing an adjournment of the sale to a certain date, without notice to the mortgagor. *Old Colony Trust Co. v. Great White Spirit Co.*, 181 Mass. 413 (63 N. E. Rep. 945). A trustee's sale of property as an entirety, made under a decree of court, will be set aside, although he acted in good faith, where it clearly appears that the property was susceptible of division and that the debt could have been satisfied by a sale of a part of it. *Thomas v. Fewster*, 95 Md. 446 (52 Atl. Rep. 750). Separate tracts of land must, when the circumstances will permit, be appraised and sold separately. But when the decree in a foreclosure action orders the land sold subject to a prior mortgage, the amount of which greatly exceeds the value of the property, and does not decree a sale in separate parcels, the sheriff may, in the exercise of his discretion, offer and sell the property as an entirety. *Mallory v. Patterson*, 63 Neb. 429 (88 N. W. Rep. 686). Where a decree of foreclosure contains no direction as to the manner of selling the mortgaged property, error will not be presumed from the sale en masse of two contiguous tracts. *Iowa Loan & T. Co. v. Devall's Estate*, 63 Neb. 826 (89 N. W. Rep. 381); *Omaha Loan & T. Co. v. Lynch*, (Neb.) 90 N. W. Rep. 217.

Sec. 501. Application of proceeds of sale. Upon a sale under a prior mortgage of land subject to a mechanic's lien, the lienholder's claim is regarded in equity as transferred to any surplus; and he may maintain an action against such a mortgagee who has in his hands a surplus over the mortgage debt. *Knowles v. Sullivan*, 182 Mass. 318 (65 N. E. Rep. 389). Where several notes are secured by a mortgage, and the mortgaged property does not sell for enough to pay all of them, the proceeds should be ratably applied on all of the notes including one outlawed at the time of the commencement of action to foreclose. *Patrick v. National Bank of Com-*

merce, 63 Neb. 200 (88 N. W. Rep. 183). Where the first maturing note of a series of four, all secured by the same mortgage, contains a stipulation that default in its payment matures the entire mortgage debt, a surety on the note first maturing, in case of default in its payment, is entitled to have the proceeds of a foreclosure applied pro rata on all the notes, there being no stipulation in the mortgage giving the mortgagee authority to apply them on any of the notes to the exclusion of the others. *Bostick v. Jacobs*, 133 Ala. 344 (32 So. Rep. 136; 91 Am. St. Rep. 36). Where a mortgagee obtaining a decree of foreclosure and judgment for the mortgage debt assigns 12-15 of such judgment, one share each to twelve persons, and eight of these afterward assigned their shares to another, and the remaining four re-assigned their shares to the mortgagee, the proceeds of a subsequent sale under the foreclosure decree should be first applied to the payment of said 12 shares in said judgment, in preference to the 8-15 retained by the mortgagee. *Alden v. White*, 32 Ind. App. 671 (66 N. E. Rep. 509). See opinion for discussion of equitable principles sustaining this holding. *Hill's Ann. Or. Laws*, §§ 296, subds. 3, 5; 417, construed and applied—disposition of surplus. *Close v. Riddle*, 40 Or. 592 (67 Pac. Rep. 932; 91 Am. St. Rep. 580).

Sec. 502. Validity of foreclosure sale—Setting aside.

The owner of a mortgage who, upon the death of his mortgagor, is appointed administrator of his estate may foreclose his mortgage while acting as administrator and purchase the property at a sale thereunder for the full amount due on the mortgage with the costs of foreclosure, where he acts fairly and in good faith. *Fleming v. McCutcheon*, 85 Minn. 152 (88 N. W. Rep. 433). A simulated decree of foreclosure and sale upon a mortgage upon real property, without consent or knowledge of the owner of the debt and instrument which the mortgage was given to secure, and in a name, as plaintiff, that does not appear in the mortgage or upon the records of the register of deeds, and a sale and conveyance pursuant to such simulated decree, are ineffectual upon the rights of the true owner of the debt and mortgage. *Bradford Sav. Bank & T. Co. v. Crippen*, 63 Neb. 210 (88 N. W. Rep. 166). A sale is not invalidated by the failure of the sheriff to note on the order of sale the hour of the day on which it came into his hands; nor because the order contains no provision as to when

it is returnable. *Gooding v. Ransom*, 63 Neb. 78 (88 N. W. Rep. 169). The omission from the order under which a sheriff acts in making a sale, of a sum found and decreed to be a third lien, is not sufficient ground for setting aside the sale, where the property does not sell for enough to satisfy the prior liens. *Lamson v. Bohrer*, 63 Neb. 105 (88 N. W. Rep. 161). Irregularities on the part of a master, or a departure from the terms of the decree in conducting the sale, do not require that the sale should be set aside, unless it also appears, or there is good reason to believe, that the party complaining has been injured thereby, and also has a right to be heard concerning the matter of which he complains. *Old Colony Trust Co. v. Great White Spirit Co.*, 181 Mass. 413 (63 N. E. Rep. 945). When it appears that a plaintiff, who held title to several distinct lots of land as security for a debt, having obtained judgment by proper proceeding, caused all of said lots to be levied on, and by mistake one of such lots was neither advertised to be sold nor sold, and the plaintiff became the purchaser at the sale of those lots which were sold, bidding the amount of his judgment, equity will not set aside such sale on the application of the purchaser on the ground of a mistake of fact, in that he thought all the lots so levied on were included in the advertisement and sale. *Keith v. Brewster*, 114 Ga. 176 (39 S. E. Rep. 850). A sale of land worth \$4,500 for the sum of \$40 under a second mortgage given to secure a debt of \$4.50 will be set aside, where it appears that the first mortgage thereon for \$900 had been paid off and released before the sale, though the release was not recorded and neither the purchaser nor the second mortgagee had any knowledge of it. *Hoffman v. McCracken*, 168 Mo. 337 (67 S. W. Rep. 878). In Nebraska the confirmation of a foreclosure sale will not be vacated merely because the order of sale was not returned within 60 days from its date. *De Groot v. Wilson*, 63 Neb. 423 (88 N. W. Rep. 657); *Cross v. Leidich*, 63 Neb. 420 (88 N. W. Rep. 667). For particular objections to confirmation of sale held insufficient, see *Hart v. McDonnell*, 64 Neb. 856 (90 N. W. Rep. 910); *Cuyler v. Lilly*, Neb. (91 N. W. Rep. 391). Neb. Code Civ. Proc., § 602, subd. 3, construed and applied—motion to vacate decree—effect as to invalidating sale. *Omaha Loan & T. Co. v. Walenz*, 64 Neb. 89 (89 N. W. Rep. 623).

Sec. 503. Title, rights and liabilities of purchaser.

A purchaser at a sale under a mortgage given by one to secure

his individual debt on land conveyed to him as executor takes charged with notice of the trust. *Bertram v. Ross*, (Ky.) 66 S. W. Rep. 638; 23 Ky. Law Rep. 1927. The acts of a mortgagee in advertising a foreclosure of land, making the sale and receiving the purchase money, do not create an implied warranty of title so as to give a purchaser at such sale a right of action against him, upon the sale being held invalid because the mortgage had been given by one as surety who had been released by an extension to the principal. *Barden v. Stickney*, 130 N. C. 62 (40 S. E. Rep. 842). The right or interest in real property acquired by a purchaser at a mortgage foreclosure sale will pass by the execution and delivery of a quitclaim deed in common form during the year prescribed for redemption, and in case there is no redemption the title to the premises will vest in the grantee named in the deed. *Tuttle v. Boshart*, 88 Minn. 284 (92 N. W. Rep. 1117). A statute (Ill. Rev. Stat., ch. 77, § 30) providing that the holder of a certificate of sale under mortgage foreclosure may have a deed at any time within five years from the expiration of the time of redemption, and when such deed is not taken within the time limited by the statute, unless it be wrongfully withheld, or its execution restrained by the court, the certificate shall be null and void, is constitutional and applies to mortgages and deeds of trust executed before the passage of the statute; and when a certificate becomes void under this statute the holder thereof ceases to have any interest whatever in the premises. *Bradley v. Lightcap*, 201 Ill. 511 (66 N. E. Rep. 546). This construction of the statute is approved in a later opinion discussing this subject, in which it is held that the statute applies to a beneficiary in a trust deed who takes possession pending its foreclosure and afterward purchases the property at a sale under such foreclosure. His title rests on such sale and all his rights are lost by failure to take out a deed within five years from the expiration of the period of redemption; and his possession gives him no enforceable equity in the land though continued for more than 30 years without objection from the mortgagor or his grantee. *Hand and Boggs, JJ., dissenting. Bradley v. Lightcap*, 202 Ill. 154 (67 N. E. Rep. 45).

Sec. 504. Right of purchaser to possession and writ of assistance. When necessary, the court making the sale may issue a writ of assistance to put the purchaser in possession. *Magruder v. Kittle*, (Neb.) 89 N. W. Rep. 272. In

Indiana, the circuit court, sitting as a court of equity, has the power to issue a writ of assistance to put the purchaser at a mortgage foreclosure sale in possession, notwithstanding the statute (Burns' Ind. Rev. Stat., §§ 1062, 1096) gives other remedies for the recovery of possession in such cases, these remedies not being exclusive. The grantee of such a purchaser has the same rights as to a writ of assistance. In proceedings for a writ of assistance by one claiming possession of real estate under a mortgage foreclosure sale, an answer by the mortgagor that the decree was procured by fraud is insufficient on demurrer; it not being averred in such answer that suit was pending to set aside such decree, or that such suit was contemplated. *Emerick v. Miller*, 159 Ind. 317 (64 N. E. Rep. 28).

Sec. 505. Foreclosure by advertisement. Where the foreclosure is by the assignees of mortgagees the fact that the advertisement of the mortgage sale was signed "By order of mortgagees," and not by the assignees of the mortgagees, does not render the sale void. *Babcock v. Wells*, R. I. (54 Atl. Rep. 599). Where several tracts or parcels of land, upon each of which a distinct lien is applied thereto, are embraced in a single mortgage instrument, it is optional with the owner of the security, upon default, to enforce his rights in one proceeding for each separate lien, or to include all the liens covered by one mortgage in one foreclosure by advertisement. If he has a separate foreclosure for each lien, he is entitled to the same costs, disbursements, and attorney's fees, as if each were covered by a separate mortgage; but if he includes all the liens in one foreclosure, he can not have costs and disbursements for but one foreclosure. *Farnsworth Loan & Realty Co. v. Commonwealth Title Ins. & T. Co.*, Minn. 179 (91 N. W. Rep. 469). Construing and applying Burns' Ind. Rev. Stat., §§ 6095-6104, 6164, it is held that where there is a default in the payment of a mortgage to secure permanent endowment funds of the State University, the auditor of state is not required to foreclose the mortgage, but may sell the mortgaged land by public advertisement without suit. *Fisher v. Brower*, 159 Ind. 139 (64 N. E. Rep. 614). See opinion for construction of § 6109 as to requisites of the public notice. This statute is constitutional. *McElwain-Richards Co. v. Gifford*, 159 Ind. 534 (65 N. E. Rep. 576). Me. Rev. Stat., ch. 90, § 5 construed

and applied—foreclosure by publication—recording notice. *Stafford v. Morse*, 97 Me. 222 (54 Atl. Rep. 397).

Sec. 506. Power of sale—Revocation. Where there are two trustees in a mortgage with power of sale, the power devolves upon the survivor. *Cawfield v. Owens*, 129 N. C. 286 (40 S. E. Rep. 62). A power of sale in a mortgage is a cumulative remedy and does not deprive the mortgagee of the right to foreclose. *Herrick v. Teachout*, 74 Vt. 196 (52 Atl. Rep. 432). A power of sale in a mortgage, conferred on certain persons or their successors, may be exercised by an assignee of the mortgage though it does not so expressly stipulate and though the assignee claims through a corporation incapable of exercising the power. *Maslin v. Marshall*, 94 Md. 480 (51 Atl. Rep. 85).

The death of a grantor in a deed of trust and the subsequent administration of his estate revokes a power of sale given to the trustee by such deed. *Markham v. Wortham*, Tex. Civ. App. (67 S. W. Rep. 341). See, on this point, *Swearingen v. Williams*, 28 Tex. Civ. App. 559 (67 S. W. Rep. 1061). Following, with some hesitancy, the case of *Buchanan v. Monroe*, 22 Tex. 537, it is held by the supreme court of Texas that the death of the grantee of one-half interest in property subject to a mortgage with a power of sale, whose deeds recites the assumption of one-half of the debt, revokes the power, after which the land can be subjected to payment of the debt only in proceedings for the administration of decedent's estate. *Whitmire v. May*, 96 Tex. 317 (72 S. W. Rep. 375).

Sec. 507. Power of sale—Sale under. A bidder to whom property is knocked off at a sale under a power, with knowledge that the sale was to be for cash, is not entitled to demand a conveyance unless the amount of his bid is duly tendered in cash, if not immediately after the property is knocked off to him, at least during the legal hours on the day upon which the sale is had. *Dwelle v. Blackshear Bank*, 115 Ga. 679 (42 S. E. Rep. 49). The heirs of a mortgagor can not, without paying the mortgage debt, recover the land from grantees claiming under a continuous chain of title from one who entered upon the land, under a deed made in execution of a defective and invalid power of sale contained in the mortgage, in good faith and in the honest belief that he was

clothed with the legal title at the time of such entry. *Sims v. Steadman*, 62 S. C. 300 (40 S. E. Rep. 677). For discussion of the statutes of Georgia as to whether a sale under a power is within the statute of frauds, see *Seymour v. National Bldg. & Loan Ass'n*, 116 Ga. 285 (42 S. E. Rep. 518). *Sand. & H. Ark. Dig.*, § 5112 construed and applied—appraisement of land before sale under power—residence of appraisers. *Raines v. Graham*, Ark. (69 S. W. Rep. 551). For exhaustive collation of authorities on "Sales under powers in mortgages and trust deeds," see 92 Am. St. Rep. 573-598.

Sec. 508. Power of sale—Sale under—Purchase by mortgagee. In Alabama, where a mortgagee purchases at his own sale, made under a power in his mortgage without being authorized to do so, the mortgagor and those holding in privity with him may elect to disaffirm such sale and be let in to redeem, such election being expressed within a reasonable time which has been fixed at two years by analogy to the statute. In the absence of special circumstances excusing the delay, the failure to act within that time bars the right, notwithstanding mere irregularities may have existed in the exercise of the power of sale. See opinion for particular circumstances held not to excuse further delay. *Elrod v. Smith*, 130 Ala. 212 (30 So. Rep. 420). The purchase by the mortgagee in such cases does not of itself avoid the sale; it is voidable at the option of the persons having the right to elect to so declare it, when such election is duly exercised, but valid as to all other parties. *Woodruff v. Adair*, 131 Ala. 530 (32 So. Rep. 515). A disaffirmance and tender of redemption by the proper persons, made within the two years, entitles them to a decree of redemption, though the suit to redeem is not brought until after the two years. *Douthit v. Nabors*, 133 Ala. 453 (32 So. Rep. 625). A mortgagee can not purchase at a sale under a power contained in his mortgage, either directly or indirectly, unless the mortgage confers such right, or the mortgagor consents to such purchase. Such a sale may be avoided by the mortgagor without proof of fraud or unfairness therein; and this right is assignable and passes by a quitclaim deed. *Houston v. National Mutual Bldg. & Loan Ass'n*, 80 Miss. 31 (31 So. Rep. 540; 92 Am. St. Rep. 565; see pp. 573-598 for exhaustive collation of authorities on "Sales under powers in mortgages and deeds of trust"). As to rules governing an accounting

upon such a sale being set aside, see *National Mut. Bldg. & Loan Ass'n v. Houston*, 81 Miss. 386 (32 So. Rep. 911).

Sec. 509. Deed of trust to secure debts. A breach of the conditions of a trust deed being established, proof of a demand is not a prerequisite to maintaining ejectment. *Brown v. Schintz*, 203 Ill. 136 (67 N. E. Rep. 767). A grantor in a deed of trust to secure debts may maintain an action for injury to the property, its value after the injury being still sufficient security for the debt. *Watkins v. Kaolin Mfg. Co.*, 131 N. C. 536 (42 S. E. Rep. 983; 60 L. R. A. 617). A deed of trust given to secure a debt is a mortgage, within the meaning of Cal. Code Civ. Proc., § 726, providing that only one action, and that the one prescribed therein, can be maintained to enforce any debt or right secured by a mortgage; hence a personal action for a debt secured by such a deed can not be maintained until the security is first exhausted. *Herbert Craft Co. v. Bryan*, Cal. (68 Pac. Rep. 1020). Where a mortgage in the form of a trust deed contains a reservation giving the mortgagor the right to lease any of the lots with the approval of the trustee, and that then the same and the premises, water power and all other rights and privileges described therein shall no longer be subject to the lien of this mortgage, except that this mortgage, during the life thereof, shall be a lien upon the rents reserved in said lease or leases, it is held that the word "premises" refers to the lots leased, and not to the estate granted. *Sands v. Kaukauna Water Power Co.*, 115 Wis. 229 (91 N. W. Rep. 679). See opinion for discussion of definition of "premises". Where one who has conveyed land in trust as security for bonds, to protect the bondholders against a prior lien thereon, makes a deposit of money which is invested by the trustee in some of the bonds secured by the trust deed, the grantor may assign such bonds and his assignee takes title thereto as against a subsequent purchaser of the equity of redemption at a sale under a judgment rendered after the assignment, and he has all the rights of the other bondholders, including that of foreclosure, subject only to their equities arising from the purpose of the deposit. *Moses v. Philadelphia Mortg. & Trust Co.*, 131 Ala. 554 (32 So. Rep. 612). Upon foreclosure by the trustee of a deed of trust containing a promise to pay the debt, without taking any personal judgment therefor, the cestui que trustent may maintain an action at law for

any deficiency remaining after sale of the property. *National City Bank v. Torrent*, 130 Mich. 259 (89 N. W. Rep. 938).

Sec. 510. Deed of trust to secure debts—Sale under.

A power to sell includes the power to execute a conveyance in pursuance of a sale under such power. *McNiell v. Lee*, 79 Miss. 455 (30 So. Rep. 821). The authority to sell, given a trustee in a trust deed, can not be delegated by him to another, and a sale made by one to whom he has attempted to delegate such authority is void. *North American Trust Co. v. Chappell*, 70 Ark. 507 (69 S. W. Rep. 546). A trustee in a deed of trust given to secure a note, invested by its terms with power to sell the land to pay the note and execute a deed therefor, does not lose this power by the bringing of an action to foreclose the deed, treating it as a mortgage, and an attempted sale by him to pay the note which he has assigned to another, will not be enjoined on account of the pendency of such action of foreclosure. *Mayhall v. Eppinger*, 137 Cal. 5 (69 Pac. Rep. 489). *Sand. & H. Ark. Dig.*, § 5111 construed and applied—validity of sale for less than two-thirds of appraised value. *Meunse v. Harper*, 70 Ark. 309 (67 S. W. Rep. 869). *Miss. Code*, § 2484 construed and applied—time, place, and notice, of sale when trust deed is silent on these points. *Williams v. Dreyfus*, 79 Miss. 245 (30 So. Rep. 633). *Tex. Laws* 1889, p. 143 (Rev. Stat. 1895, art. 2369) construed and applied—notice of sale under deed of trust. *Fisher v. Simon*, 95 Tex. 234 (66 S. W. Rep. 447); *Marston v. Yaites*, Tex. Civ. App. (66 S. W. Rep. 867); *Fischer v. Simon*, Tex. Civ. App. (66 S. W. Rep. 882).

Sec. 511. Deed of trust to secure debts—Appointment or substitution of trustee—Sale by. The authority to appoint a substituted trustee under a stipulation contained in a deed of trust is a strict power, and such an appointment can not be made, except upon the happening of the precise event specified in such deed. *McNeill v. Lee*, 79 Miss. 455 (30 So. Rep. 821). Under *Miss. Laws* 1896, ch. 96, a sale of land by a substitute trustee before the filing for record of his appointment is void, although such appointment was duly filed after the sale. *Hyde v. Hoffman*, Miss. (31 So. Rep. 415). For further construction of this statute, see *Shipp v. New South Bldg. & Loan Ass'n*, 81 Miss. 17 (32 So. Rep. 904). The power given a beneficiary in a trust deed to appoint a sub-

stitute in case the trustee named therein should fail or refuse to act or become disqualified, does not authorize the appointment of a substitute trustee merely on the request of the beneficiary in which the original trustee acquiesces, and a sale made by one so appointed is void; nor does the fact that the original trustee had never accepted the trust invalidate the deed or authorize the appointment of a substitute, he having the right to accept and enforce the deed when called on to do so after default. *Bracken v. Bounds*, 96 Tex. 200 (71 S. W. Rep. 547).

Sec. 512. Mortgage to secure several notes. Where a mortgage with a power of sale to the mortgagee, given to secure several notes due at different times, stipulates that in case default is made in the payment of any one of these notes, and sale is made of the mortgaged property, the mortgagee, after payment of the expenses of sale, may "apply and appropriate the residue thereof to the payment of the amount of principal and interest of said notes hereby secured," upon such a sale the mortgagee may apply the proceeds to notes not due, although he does this to enable him to apply other property of the mortgagor attached by him to the payment of the notes which are due. *Hutchings v. Reinalter*, 23 R. I. 518 (51 Atl. Rep. 429; 58 L. R. A. 680).

Sec. 513. Building and loan association mortgages. A statute (Burns' Ind. Rev. Stat., § 4463e), providing that "the bonds, notes or mortgages belonging to any association shall not be negotiable except upon an order of the circuit court or the judge thereof, in vacation, of the county in which the principal office of said association is situated," is held constitutional; but such instruments were negotiable and assignable prior to this statute. *Bowlley v. Kline*, 28 Ind. App. 659 (63 N. E. Rep. 723). Upon foreclosure by a going association, it is entitled to recover interest and monthly premium as stipulated for in the contract up to the time of the recovery. *Racer v. International Bldg. & L. Ass'n*, Ind. App. (63 N. E. Rep. 772). A borrowing stockholder in a building and loan association can not defend against a mortgage given to secure a loan made to him by such association on the ground that the contract was ultra vires or that there had been improper conduct in the management of the affairs of the association. *Menominee Loan & Bldg. Ass'n v. Lovell*, 131 Mich.

449 (91 N. W. Rep. 743). In an action to foreclose a mortgage given to a building and loan association organized under the laws of Nebraska, the fact that the association changed its method of making loans and conducting its business after the making of the mortgage is no defense to the action, especially in the absence of a showing that the mortgagor objected thereto. *South Omaha Loan & Bldg. Ass'n v. Wirrick*, 63 Neb. 598 (88 N. W. Rep. 694). Notice by a borrowing stockholder to his association that he desires to withdraw his shares of stock, have the same credited on his mortgage, and pay the balance, is not such a tender as prevents foreclosure by the association; and, in an action by him to settle the loan in this manner, the association may (Cal. Code Civ. Proc., § 442) file a cross complaint to foreclose the mortgage. *Haensel v. Pacific States Sav. & L. & Bldg. Co.*, 135 Cal. 41 (67 Pac. Rep. 38). Burns' Ind. Rev. Stat., § 4463 construed and applied—legalizing contracts for the payment of premiums with or without bidding. *Racer v. International Bldg. & L. Ass'n*, Ind. App. (63 N. E. Rep. 772). Ia. Code 1897, § 1898 removed the necessity for competitive bidding in the making of building and loan association loans, and this section is made retroactive by Laws 27th Gen. Assem., ch. 48. *Tootle v. Singer*, 118 Ia. 533 (88 N. W. Rep. 446). Wis. Rev. Stat. 1898, §§ 2014-2015, giving to mortgages of mutual building and loan associations priority over other liens upon the mortgaged premises and the buildings and improvements thereon, filed subsequent to recording of the mortgage, is constitutional and is not repealed by § 3314. *Julien v. Model Bldg., L. & Inv. Co.*, 116 Wis. 79 (92 N. W. Rep. 561; 61 L. R. A. 668).

Sec. 514. Building and loan association mortgages—Foreign associations. Where a foreign building and loan association through its agent in another state makes a loan to a citizen thereof taking a mortgage on property in the latter state and a subscription to its stock to the amount of the mortgage which contract of subscription stipulates that the articles of the association are made a part thereof, which articles provide that the association has its principal office in the state of its domicile, where all its business must be conducted, payments made and contracts passed upon, the transaction is not governed by the usury laws of the state of the mortgagor, nor does it constitute doing business therein, within the meaning of Pa. Laws 1874, p. 108, imposing

certain conditions upon foreign corporations doing business within the state. *People's Bldg., L. & Sav. Ass'n v. Berlin*, 201 Pa. St. 1 (50 Atl. Rep. 308; 88 Am. St. Rep. 764). Contracts made within Nebraska with residents of that state with a foreign building and loan association, through its agents, are Nebraska contracts; and their construction, validity and enforcement are governed by its laws. *People's Bldg., L. & Sav. Ass'n v. Shaffer*, 63 Neb. 573 (88 N. W. Rep. 669). Where an association, making a loan to a resident of another state on property in his state, establishes therein local boards or agents through which it receives stock subscriptions, applications for loans, and payments of interest and premium, the contract becomes subject to the laws of that state, notwithstanding the notes are made payable at the domicile of the corporation. *Shannon v. Georgia State Bldg. & Loan Ass'n*, 78 Miss. 955 (30 So. Rep. 51; 57 L. R. A. 800; 84 Am. St. Rep. 657); *National Mut. Bldg. & Loan Ass'n v. Brahan*, 80 Miss. 407 (31 So. Rep. 840; 57 L. R. A. 793); *National Bldg. & Loan Ass'n v. Wilson*, 78 Miss. 993 (30 So. Rep. 56). See opinion in first two cases for exhaustive discussion of this subject.

Sec. 515. Building and loan association mortgages—

Usury. Requiring the payment of a monthly premium in addition to the legal rate of interest does not render a loan by a building and loan association usurious. *Beyer v. National Bldg. & Loan Ass'n*, 131 Ala. 369 (31 So. Rep. 113). In Mississippi it is held that where the fixed premium and interest, contracted to an association for a loan, together exceed the legal rate of interest, the transaction is usurious. *Shannon v. Georgia State Bldg. & Loan Ass'n*, 78 Miss. 955 (30 So. Rep. 51; 57 L. R. A. 800; 84 Am. St. Rep. 657); *Georgia State Bldg. & Loan Ass'n v. Brown*, Miss. (31 So. Rep. 911). The rule is otherwise in Wisconsin, under Rev. Stat., § 2013. *Bullman v. Citizens' Loan & Bldg. Ass'n*, 114 Wis. 217 (90 N. W. Rep. 199). In West Virginia it is held that in order for the addition of a premium to the legal rate of interest to escape condemnation for usury, the premium must be a lump sum, certain and definite, payable in advance or in periodical installments, and not a percentage payable indefinitely at fixed periods. *McConnell v. Cox*, 50 W. Va. 469 (40 S. E. Rep. 349). Mich. Comp. Laws, §§ 7581, 7584, excepting from the operation of the law against usury the

premium bid for a loan from a building and loan association and interest on such premium, do not except a specified reservation of interest, as such, on the loan from the operation of the general usury statute, but only premiums and the interest thereon. *Estey v. Capitol Inv., Bldg. & L. Ass'n*, 131 Mich. 502 (91 N. W. Rep. 753). A foreign building and loan association is subject to the penalties of the statute of Nebraska against usury. See opinion for particular contract held to be usurious. *Anselme v. American Sav. & Loan Ass'n*, Neb.

(92 N. W. Rep. 745). In dealing with building and loan association contracts made by an association in other states than the state of its domicile, the supreme court of Alabama adheres to the rule that, when not done with the intent and purpose of evading the usury laws, parties may contract for the payment of interest according to the law of either the place of making of the contract or the place of its performance without offending against such laws. *Pioneer Sav. & Loan Co. v. Nonnemacher*, 127 Ala. 521 (30 So. Rep. 79); *Barrett v. Central Bldg. & Loan Ass'n*, 130 Ala. 294 (30 So. Rep. 347). In Oregon it is held that a contract for a loan usurious under its laws made in that state and secured by a mortgage on real estate therein, by a foreign loan association, but which is made payable in the state where such association has its domicile under the laws of which state the contract is not usurious, will not be enforced by the courts of Oregon. *Pacific Bldg. Co. v. Hill*, 40 Or. 280 (67 Pac. Rep. 103; 56 L. R. A. 163; 91 Am. St. Rep. 477). This case is followed in *Hicenbothorn v. Interstate Sav. & L. Ass'n*, 40 Or. 511 (69 Pac. Rep. 1018). In Mississippi it is held that where an association having its domicile in one state makes a loan to a resident of Mississippi on property in that state, its laws determine whether the transaction is usurious, where such association has established in Mississippi local boards or agents which solicit stock subscriptions, applications for loans, and payments of dues, interest and premiums, notwithstanding the notes given for the loan are payable at the domicile of the corporation. *National Mut. Bldg. & Loan Ass'n v. Brahan*, 80 Miss. 407 (31 So. Rep. 840; 57 L. R. A. 793); *Shannon v. Georgia State Bldg. & Loan Ass'n*, 78 Miss. 955 (30 So. Rep. 51; 57 L. R. A. 800; 84 Am. St. Rep. 657); *National Bldg. & Loan Ass'n v. Wilson*, 78 Miss. 993 (30 So. Rep. 56); *Georgia State Bldg. & Loan Ass'n v. Shannon*, 80 Miss. 642 (31 So. Rep. 900). For construction of particular building and loan contracts,

as affected by the law against usury, see *Pacific Bldg. Co. v. Hill*, 40 Or. 280 (67 Pac. Rep. 103; 56 L. R. A. 163; 91 Am. St. Rep. 477); *Pioneer Sav. & Loan Co. v. Nonnemacher*, 127 Ala. 521 (30 So. Rep. 79); *Barrett v. Central Bldg. & Loan Ass'n*, 130 Ala. 294 (30 So. Rep. 347); *Farmers' Sav. & Bldg. & Loan Ass'n v. Kent*, 131 Ala. 246 (30 So. Rep. 874); *American Bldg., Loan & Tontine Ass'n v. McClellan*, Ark. (70 S. W. Rep. 463).

Sec. 516. Building and loan association mortgages—

Accounting—Computation of amount due. Where his cessation of payments terminates a borrower's connection with an association as a stockholder, fines afterwards accruing for his nonpayment of premiums can not be collected. *Kleimeir v. Covington Perpetual Bldg. & Loan Ass'n*, Ky. (70 S. W. Rep. 41; 24 Ky. Law Rep. 735). Monthly payments made by a borrowing stockholder may be applied to the payment of the stock instead of the reduction of the debt, where his mortgage so stipulates; but such stipulation will be treated as modified or waived where the mortgagee applies the payments to the mortgage debt with the assent of the mortgagor. *Capital City Ins. Co. v. Jones*, 128 Ala. 361 (30 So. Rep. 674). In Kentucky it is held that where a borrowing member's relation to his association as a stockholder is not bona fide, but a mere cover for usury, upon a settlement while the association is a "going concern," he is entitled to have all the payments made by him applied first to the extinguishment of the interest, and then the principal at the date thereof, and that all charged against him by the company in excess of 6 per cent. interest should be disallowed. *Kleimeir v. Covington Perpetual Bldg. & Loan Ass'n*, Ky. (70 S. W. Rep. 41; 24 Ky. Law Rep. 735). For statement of rules in Nebraska governing an accounting with a defaulting borrower and stockholder in a foreign association, see *McDowell v. Pioneer Sav. & Loan Co.*, (Neb.) 90 N. W. Rep. 111; *People's Bldg., Loan & Sav. Ass'n v. Gilmore*, (Neb.) 90 N. W. Rep. 108.

Sec. 517. Building and loan association mortgages—

Rights of parties upon insolvency of association. The equitable principle of accounting which governs when an association goes into voluntary liquidation is the same whether the association is solvent or insolvent. *People's Bldg. & Loan Ass'n v. McPhillamy*, 81 Miss. 61 (32 So. Rep. 1001; 59 L. R. A. 743; 95

Am. St. Rep. 454). Where a building and loan association is insolvent and unable to perform its contracts with its members, and a receiver is appointed to wind up its affairs, it is entitled to recover from a borrowing member the amount of money actually loaned, with interest thereon from date at the legal rate, less the amount paid by the member as interest and premium, with interest from the date of the several payments. Such borrower is not entitled to credit upon his loan for money paid into the association as dues upon the stock. *Anselme v. American Sav. & Loan Ass'n*, 63 Neb. 525 (88 N. W. Rep. 665). Citing, *Weir v. Association*, 56 N. J. Eq. 234 (38 Atl. Rep. 643); *Post v. Association*, 97 Tenn. 408 (37 S. W. Rep. 216; 34 L. R. A. 201); *Brown v. Archer*, 1 Mo. App. Rep'r, 465; *Association v. Lepore*, 17 Pa. Co. Ct. R. 426; *Price v. Kendall*, 14 Tex. Civ. App. 26 (36 S. W. Rep. 810); *Strohen v. Association*, 115 Pa. 273 (8 Atl. Rep. 843); *Curtis v. Association*, 69 Conn. 6 (36 Atl. Rep. 1023; 61 Am. St. Rep. 17); *Leahy v. Association*, 100 Wis. 555 (76 N. W. Rep. 625; 69 Am. St. Rep. 945); *Hale v. Cairns*, 8 N. Dak. 145 (77 N. W. Rep. 1010; 44 L. R. A. 261; 73 Am. St. Rep. 746). The same rule prevails in Indiana. *Home Sav. Ass'n v. Noblesville Monthly Meeting of Friends Church*, 31 Ind. App. 115 (66 N. E. Rep. 465). His stock payments must share the losses and expenses of winding up the concern; and he can not claim the benefit of the value of his stock until its actual value is determinable. *People's Bldg. & Loan Ass'n v. McPhillamy*, 81 Miss. 61 (32 So. Rep. 1001; 59 L. R. A. 743; 95 Am. St. Rep. 454). To the same effect, see *Wills v. Paducah Bldg. & Loan Ass'n*, Ky. (67 S. W. Rep. 991; 24 Ky. Law Rep. 21); *Catlett v. United States Bldg. & Loan Ass'n's Assignee*, (Ky.) 68 S. W. Rep. 123 (24 Ky. Law Rep. 200); *Andrews v. Kentucky Citizens' Bldg. & Loan Ass'n's Assignee*, (Ky.) 70 S. W. Rep. 409 (24 Ky. Law Rep. 966). The fact that a borrowing member previous to the insolvency of his association has brought suit seeking to have all his payments applied to the discharge of his debt, or had made application for withdrawal, does not entitle him to have his stock payments applied on his debt. *Wills v. Paducah Bldg. & Loan Ass'n*, Ky. (67 S. W. Rep. 991; 24 Ky. Law Rep. 21); *Vinton v. National Bldg. & Loan Ass'n*, 112 Ky. 622 (66 S. W. Rep. 510; 23 Ky. Law Rep. 2021). A borrowing stockholder who has given a mortgage conditioned for the payment of the principal by the accumulation of the funds of the association to

such a point as to make the stock equal to the mortgage itself, is not entitled, upon the association becoming insolvent, to have credited on the mortgage all premiums and dues paid by him, the assets not being sufficient to treat each stockholder and mortgagor in the same manner. *Whitehead v. Commercial Bldg. & Loan Ass'n*, 64 N. J. Eq. 24 (53 Atl. Rep. 679). Upon the insolvency of an association it may have foreclosure of a mortgage given by a borrowing stockholder without awaiting a determination of his share in the assets of the association, that being a matter to be adjusted upon a final settlement of its affairs. *Breed v. Ruoff*, 173 N. Y. 340 (66 N. E. Rep. 5). But in South Carolina it is held that foreclosure will not be decreed in favor of an insolvent association against a borrowing member whose payments on such stock, interest, premiums, etc., are sufficient to pay the debt in full. *Mears v. Finlayson*, 63 S. C. 537 (41 S. E. Rep. 779).

NOTICE.

EPITOME OF CASES.

Sec. 518. Notice to one of two parties taking a mortgage. Notice of an outstanding equity to one of two parties taking a mortgage is not notice to the other. *Babcock v. Wells*, R. I. (54 Atl. Rep. 596). The court say: "In *Snyder v. Sponable*, 1 Hill, 567, it was held that notice to a husband, at the time of receiving a conveyance to himself and wife, was not notice to the wife, of a prior unrecorded mortgage, so as to give the mortgage a preference in respect to her title, unless the consideration was paid by the husband, thus showing that she was not a purchaser for value. This decision was affirmed in 7 Hill, 427. In *Wait v. Smith*, 92 Ill. 385, it was held that joint purchasers who have notice of an incumbrance would hold their title subject to it, while those who had no notice would not. In *Burt v. Batavia*, 86 Ill. 66, it was held that notice of an incumbrance on property purchased by a corporation, to one of several incorporators, would not charge his associates, when he did not act as their agent in

forming the company. To the same effect is *Rippetoe v. Dwyer*, 65 Tex. 703; *Wiswall v. McGown*, 2 Barb. 270. See, also, *Arnold v. Greene*, 15 R. I. 348 (5 Atl. Rep. 503); *Holland v. Citizens' Bank*, 17 R. I. 87 (20 Atl. Rep. 231)."

Sec. 519. Knowledge sufficient to charge one with notice. One about to purchase a mortgage who has sufficient notice to put him on inquiry which would result in revealing facts showing its invalidity is not relieved from his duty to make such inquiry by the fact that competent counsel had advised him that the mortgage was valid. *Baltimore High Grade Brick Co. v. Amos*, 95 Md. 571 (52 Atl. Rep. 582). A purchaser of land, part of which is in possession of an assignee of an outstanding unrecorded lease of such portion, is charged with notice of such lease, where all the conveyances subsequent to its execution, except the deed to such purchaser, reserved the rights of the lessee. *Sweet v. Henry*, 175 N. Y. 268 (67 N. E. Rep. 574). Where an instrument constituting a link in the chain of title which a purchaser proposes to buy is lacking, and such purchaser buys without inspecting or demanding an inspection of such instrument or the record, where it is spread at length, as required by law, such purchaser is chargeable with notice of any fact appearing on the face of such instrument affecting its validity. *Lyon v. Gombert*, 63 Neb. 630 (88 N. W. Rep. 774). A deed that recites that the grantors are husband and wife, the names of which grantors are identical with those of the grantor and grantee in a recent guardian's deed of the same land, imparts notice to the purchaser that his grantors were also husband and wife at the date of the former deed. *Frazier v. Jeakins*, 64 Kan. 615 (68 Pac. Rep. 24; 57 L. R. A. 575). Particular facts held to charge purchaser with notice that the deed under which his grantor claimed was in fact a mortgage. *Price v. Ward*, 26 Nev. 387 (69 Pac. Rep. 72).

Sec. 520. Charging notice to principal on account of knowledge of his agent or attorney. Knowledge of a vendor's insolvency by an attorney employed by the vendee merely to examine the title is not imputable to him. *Weil v. Reiss*, 167 Mo. 125 (66 S. W. Rep. 946). A purchaser of land is not charged with his attorney's knowledge of a prior unrecorded deed affecting the title acquired previous to his employment, where at the same time he is acting for the seller.

Scotch Lumber Co. v. Sage, 132 Ala. 598 (32 So. Rep. 607; 90 Am. St. Rep. 932). One who serves a building and loan association at times as its attorney or collecting agent in collecting money for it, such as dues, premiums and fines, and who sometimes fills out applications for loans from such association, for which service he is paid by the applicant, is not the agent of such association when taking an application for a loan, so as to charge it with his notice of the fact that a mortgage given by a married woman to secure a loan was given as surety. International Bldg. & L. Ass'n v. Watson, 158 Ind. 508 (64 N. E. Rep. 23). A trust company whose president, while acting as attorney for third parties, negotiated the execution of a mortgage to them which was afterward assigned to such company, is not charged with any knowledge he may have obtained in the first transaction as to the purpose for which the mortgage was given, it not appearing that he had any connection with the assignment. Tate v. Security Trust Co., 63 N. J. Eq. 559 (52 Atl. Rep. 313). The fact that the secretary of a building and loan association taking a mortgage on property more than a year previous acquired knowledge of the existence of a prior unrecorded mortgage during a transaction in which he was acting as president of a bank, will not charge the association with notice of the mortgage, the secretary never having imparted his knowledge to any officer or director and it not being shown that it was present in his mind when he voted to approve the loan. Asbury Park Bldg. & L. Ass'n v. Shepherd, N. J. Eq. (50 Atl. Rep. 65).

Sec. 521. Notice by publication. Jurisdiction of non-residents acquired in special proceedings by notice by publication is limited to such proceedings. McGaw v. Gortner, 96 Md. 489 (54 Atl. Rep. 133). A paper called the "Sunday Welcome" issued on Saturday of each week, from one to four o'clock in the afternoon, dated, mailed and delivered to subscribers on that day, which has a circulation of more than 1,000 copies, not confined to any particular sect or class of individuals, is legally a "newspaper," within the meaning of Hill's Ann. Or. Laws, § 291, so as to make the publication of a legal notice of an execution sale therein sufficient, although the tone of the paper is sensational and subject to criticism, by moralists, where it contains the sporting and some current news of general interest, many advertisements of a business nature, and has been made the medium for legal publications for

more than two years. *United States Mortg. & T. Co. v. Marquam*, 41 Or. 391 (69 Pac. Rep. 41). See opinion for discussion of this subject. Mo. Rev. Stat., §§ 575, 9303 construed and applied—sufficiency of affidavit to authorize notice by publication. *Parker v. Burton*, 172 Mo. 85 (72 S. W. Rep. 663).

NUISANCE.

DOWNING v. ELLIOTT.
(182 Mass. 28.)

Use of soft coal for fuel as a nuisance—Injunction against, on account of damage to ice pond. The use of soft coal as a fuel is not of itself a nuisance; and the owner of an ice pond from which he cuts ice for family and wholesale trade can not enjoin the use of soft coal in a steam heating plant for a green house near by, on account of the soot and cinders therefrom rendering his ice unfit for use, where it appears that the injury from this source was insignificant as compared with that resulting from other causes, and that the use of such fuel was more economical for defendant.

MORTON, J.

Sec. 522. Statement of the case. The plaintiff is engaged in the ice business, and is the owner of a pond in Brighton, from which he cuts ice for family and wholesale trade. The defendant is the owner of a greenhouse near the pond, and heated by steam. Prior to the bringing of the bill he had used soft coal; and the bill alleges that smoke, dust, soot and cinders were thereby deposited in the plaintiff's pond, and the ice rendered unfit for use. The prayer of the bill is that the defendant may be restrained from using soft coal or other fuel that will interfere with or injure the property or business of the plaintiff, and for the assessment of damages. The case comes before us on the pleadings, the master's report and supplemental report, and the plaintiff's exceptions thereto, so far as they raise questions of law, and the evidence reported by the master; such disposition to be made of the case as law and justice require. The exceptions relate to the matter of

damages, and the view which we have taken of the case renders it unnecessary to consider them.

Sec. 523. Use of soft coal for fuel as a nuisance—Injunction against, on account of damage to ice pond. The defendant's business is a lawful business, and he has a right to use his premises in any manner that will not interfere with the legal rights of others or violate the law. It can not be said, we think, that the use of soft coal for the purpose of generating steam of itself constitutes a nuisance, and there is nothing to show that the business is not a proper one to be carried on in that locality, or that it is not carried on in a proper manner. Indeed, there would seem to be few businesses less objectionable than growing plants and flowers for sale. But, though the locality is a suitable one, and the business is lawful, and carried on in a proper manner, the defendant has no right to materially contaminate the air that comes to the plaintiff's premises, and injure his business and property, by the presence and deposit of smoke, soot, dust, and cinders. Every one has a right to have the air that comes to his premises come as pure and uncontaminated as can reasonably be expected. In thickly-settled communities absolute purity is out of the question; and the more thickly-settled the community is, and the more varied are the kinds of business, the more will the atmosphere be unavoidably impregnated with impurities. This is one of the inconveniences, if it is an inconvenience, which every one who lives in a populous neighborhood must suffer. But the fact that the atmosphere is already impure does not justify or excuse a party in adding to the impurity, so as thereby to cause still further discomfort to others, or still further injury to their business or property; and conduct which leads to such a result will constitute an invasion of the rights of the parties injuriously affected thereby. But in these as in other cases an independent wrongdoer is responsible only for the consequences of his own wrongdoing, and not for the acts or conduct of others. The burden of proof is upon the party complaining, and each case must stand on its own facts. No general rules can be laid down that will furnish an infallible guide in all cases. The most that can be done is to indicate the lines along which the decision must proceed. To entitle the plaintiff to relief, the injury of which he complains must be certain and substantial, and not slight or theoretical. The right, as already observed, is not a right to absolute purity, any invasion

of which would give a right of action, but it is a right to such a degree of purity as, taking all the circumstances into account, the plaintiff is reasonably entitled to. See *Ferrule Co. v. Hills*, 159 Mass. 147 (34 N. E. Rep. 85; 20 L. R. A. 844); *Rogers v. Elliott*, 146 Mass. 349 (15 N. E. Rep. 768; 4 Am. St. Rep. 316); *Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Crump v. Lambert*, L. R. 3 Eq. 409; *Walter v. Selfe*, 4 De Gex. & S. 315; *Fleming v. Hislop* (1886) 11 App. Cas. 686; *Wood, Nuis.* (1st Ed.) § 429 et seq. In the present case the master finds that the ice was unfit and unsuitable for the plaintiff's family trade by reason of black spots resembling soot and cinders embedded in it, and that the black specks referred to had been deposited on the surface, and had sunk into the ice in the process of alternate freezing and thawing; and he says—what is obvious—that the main question in the case is to determine from what source these specks came. Upon that question he finds as follows: "I can not find that no particles of soot or carbon from the defendant's chimney are deposited on the plaintiff's pond or upon his ice, but I find and report that soot and cinders from the defendant's chimney, caused by the burning of soft coal by him, are only one cause contributing to the specks resembling soot and cinders in the plaintiff's ice, rendering it unfit and unsuitable to be used and disposed of in his family trade. I further find and report, if it is material, that the portion of soot and cinders coming from the defendant's chimney is of small importance in comparison with other causes contributing to injure the plaintiff's ice and render it unfit and unsuitable as aforesaid." These findings are warranted by other facts found by the master,—such, for instance, as the general considerations affecting the locality, the precautions taken by the defendant to prevent the escape of soot and cinders, the distance from the fire to the chimney and the distance from them to the pond, the fact that the prevailing wind was not in a direction from the greenhouse towards the pond, and the experiments and other circumstances tending to show that the atmosphere abounded in impurities from other causes. There is no finding that any unusual or extraordinary volumes of smoke issued at any time from the defendant's chimney; and the fair import of the master's findings is, it seems to us, that, while he can not say that no soot and cinders from the defendant's chimney were deposited on the plaintiff's ice, if any were deposited they contributed only slightly, if at all, to the injury to the ice, and the damage done by them was in-

significant as compared with that resulting from other causes. He further finds that, while the use of soft coal is not a necessity in carrying on the defendant's business, it is more economical, and saves him between \$400 and \$500 a year. If, therefore, an injunction should issue as prayed for, it not only will not afford the plaintiff the relief which he seeks, but will inflict great and unnecessary injury on the defendant. As the case stands, we do not think that the plaintiff is entitled to an injunction. Neither do we think that he is entitled to damages. If the alleged injuries are too slight and uncertain to be ground for an injunction, we do not see how they can be made the basis for an assessment of damages.

The result is that we think that the bill should be dismissed. So ordered.

Sec. 524. Smoke as a nuisance—Legislative and municipal power so to declare it.

Congress, in its control over the District of Columbia, may, in the exercise of its police power, declare the emission of thick or dense black or gray smoke from chimneys a nuisance *per se*, and punish the act as an offense. *Moses v. United States*, 16 App. D. C. 428 (50 L. R. A. 532). The court say: "Now, whilst the emission of ordinary smoke from the chimneys of houses does not amount to a nuisance *per se*, it is nevertheless a matter of common knowledge, not to be ignored by the courts, that the emission of a volume of dense, black smoke from a single smokestack or chimney of a large furnace, may, under some circumstances, work physical discomfort to the general public, coming within its circle of distribution upon public thoroughfares, and may possibly also work injury to public interests in other respects. Whenever it may become a special source of legal injury to an individual he will have an action of damages therefor, and, in cases of continuation, equity will afford complete relief by process of injunction. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 329 (27 L. Ed. 739, 743; 2 Sup. Ct. Rep. 719); *Ross v. Butler*, 19 N. J. Eq. 294, 302 (97 Am. Dec. 654); *Duncan v. Hayes*, 22 N. J. Eq. 25.

In a large and growing community, conditions like those suggested, and others, might well be apprehended to become widened in distribution, as well as increased in degree, through contributions to the volume of smoke made by other smokestacks or chimneys of like use. Charged with the duty of guarding the public interests, and vested, as we have seen, with wide discretion and liberty of choice in the means adapted thereto, Congress, it must be presumed, inquired into and duly considered the effect, present and prospective, of the continued emission, constantly or at intervals, of

dense black or gray smoke, upon those public interests in respect to safety, comfort, and cleanliness. And it must also be presumed that it apprehended and duly considered the probable injury to, or burden upon, private property, in such use, through the increased expense that may be involved in the use of smoke-consuming appliances, or, in case of their inefficiency, in the substitution of smokeless coal, coke, or other fuel for the soft bituminous coal which produces the objectionable smoke. The policy of adopting a regulation to meet the conditions is a matter peculiarly and exclusively within the province of the legislative department. The judiciary can only interfere with the exercise of the power where it is manifest that the regulation has no real or substantial relation to objects within the police power, and constitutes a palpable invasion of private right. *Powell v. Pennsylvania*, 127 U. S. 678, 686 (32 L. Ed. 253, 257; 8 Sup. Ct. Rep. 992, 1257); *Mugler v. Kansas*, 123 U. S. 623, 661 (31 L. Ed. 205, 210; 8 Sup. Ct. Rep. 273); *Crowley v. Christensen*, 137 U. S. 86, 91 (34 L. Ed. 620; 623; 11 Sup. Ct. Rep. 13)."

In Missouri it is held that power given a city "to declare, prevent, and abate nuisances on public or private property, and the causes thereof," does not authorize an ordinance declaring "the emission into the open air of dense black or thick gray smoke" within its corporate limits to be a nuisance, irrespective of the length of time it is emitted, or whether it is in fact a nuisance, and without providing for any inquiry as to these facts. *City of St. Louis v. Edward Heitzeberg Packing & Provision Co.*, 141 Mo. 375 (42 S. W. Rep. 954; 64 Am. St. Rep. 516; 39 L. R. A. 551, see pp. 551-554 for exhaustive collation of cases on "Municipal control over smoke as a public nuisance"). The court say: "Now, smoke alone was not a nuisance per se at common law, nor has it been so declared to be by any statute of this state. The legislature has defined what shall constitute a nuisance in this state by general enactment, in these words: 'Every person who shall erect or maintain any public nuisance * * * to the annoyance or injury of any portion of the inhabitants of this state, shall be deemed guilty of a misdemeanor,' 1 Mo. Rev. Stat. 1889, § 3851. Numerous cases may be found collated by the author in 1 Wood, Nuisances, 3d. Ed. § 505, and notes, which hold that smoke alone may constitute a private nuisance; but, in order to have that effect, it must either produce a tangible injury to property, as by the discoloration of buildings, injury to vegetation, discoloration of furniture or clothing or merchandise, or some tangible injury to property, real or personal, or sensibly impair its comfortable enjoyment; but in all of these cases it is a question of fact, depending on the character of the smoke, the quantity, the location and circumstances. *St. Paul v. Gilfillan*, 36 Minn. 298; *Signal v. Cleveland*, 3 Ohio N. P. 119. None of the authorities cited by the learned counsel for the

city state the law otherwise save the decision in *Field v. Chicago*, 44 Ill. App. 410. That was a prosecution under the smoke ordinance of Chicago, and the defendants requested the trial court to give the following instruction: 'The jury are instructed that it is the duty of the city to prove that, among other things, the smoke that issued from the chimney of the defendants at the time complained of was not only dense, but was, at that particular time, of a nature detrimental to the property which was close enough in proximity to it to be affected by it injuriously, or was of a nature to be personally annoying to the public at large, and unless the jury believe, from the evidence, that the smoke complained of was, at the particular time in question, dense, and also proved to be detrimental to property within the city of Chicago, or was of a nature to be personally annoying to the public at large, then your verdict should be for the defendants.' Concerning the propriety of refusing this instruction, the court said: 'The last half of it, as to what the jury should believe in order to convict, was perhaps proper, but the first half, requiring the city to prove what may be presumed without proof, was not. It is a matter of common knowledge that smoke becomes soot, which falls and blackens where it rests; that it is injurious to vegetation, to many kinds of goods, and annoying to people. This common knowledge is so generally diffused in Chicago, that no jury could be without it.' That case is the only one which holds that smoke is a nuisance per se; that it is unnecessary to prove that any annoyance followed its emission, or that it was detrimental to any property. The supreme court of Illinois, in *Harmon v. Chicago*, 110 Ill. 400 (51 Am. Rep. 698), expressly declined to say whether the mere emission of dense smoke in the city of Chicago, without proof that it was a nuisance in fact, was a nuisance per se. On the other hand, the supreme court of Minnesota, in *St. Paul v. Gilfillan*, 36 Minn. 298, held that 'the emission of dense smoke from smoke-stacks or chimneys is not necessarily a public nuisance. Whether so or not, would depend largely upon the locality and surroundings.' In that case the ordinance was held void because no provision was made for a determination of the question upon the facts of any particular case, and for the reason that the city had no power to pass such an ordinance. The smoke ordinance of the city of Detroit was upheld by the supreme court of Michigan in *People v. Lewis*, 86 Mich. 273; but that ordinance was radically different from the St. Louis ordinance, in that it only made the emission of 'dense smoke, or smoke containing soot * * * which shall damage the property or injure the health of any person, or shall specially annoy the public,' an offense. It is unnecessary to add that the Detroit ordinance defines a nuisance at common law. In *Harmon v. Chicago*, 110 Ill. 400 (51 Am. Rep. 698), the admission that the smoke emitted was detrimental to property, and a personal annoyance to the public,

was made the basis of the decision, whatever views the court may have entertained on the question before us. The British act of Parliament (29 & 30 Vict., ch. 90, § 19) enacts that 'the word "nuisance" shall include every chimney (not being the chimney of a private dwelling house) sending forth black smoke in such quantity as to be a nuisance.' It is obvious from its terms that it depends in each case whether the smoke was emitted in such quantity as to be a 'nuisance' within the meaning of the English law." For exhaustive collation of authorities as to when smoke may constitute a nuisance, see 1 Wood, Nuisance, (3d Ed.) § 505, and notes; Am. & Eng. Enc. Law (1st Ed.) Vol. 16, p. 948, n. 9; Id. (2d Ed) Vol. 21, p. 694.

EPITOME OF CASES.

Sec. 525. What constitutes a nuisance. The creation of offensive odors by cooking may become a nuisance. *Shroyer v. Campbell*, 31 Ind. App. 83 (67 N. E. Rep. 193). The fact that odors from a manufacturing plant are unpleasant will not alone make it a nuisance; to have that effect they must work some substantial annoyance, some material physical discomfort, to those who live in the neighborhood, or injury to their health or property. *Duffy v. E. H. & J. A. Meadows Co.*, 131 N. C. 31 (42 S. E. Rep. 460). The reasonable use of property as a blacksmith shop is not a nuisance. *Faucher v. Trudel*, 71 N. H. 621 (52 Atl. Rep. 443). One owning property adjoining a building used for hotel purposes may be enjoined from maintaining on his land a glass factory, the annoying noises and offensive odors of which render the rooms in the hotel next to his premises untenable. *Leeds v. Bohemian Art Glass Works*, 63 N. J. Eq. 619 (52 Atl. Rep. 375). A pond created by the erection of a mill dam, which materially contributes to a condition of malaria, may constitute a private nuisance subject to injunction by one whose health and the health of whose family is endangered thereby; and this right is not affected by the fact that other and natural ponds in the same vicinity contribute to the injury. *Richards v. Daugherty*, 133 Ala. 569 (31 So. Rep. 934). Hitching posts placed by a county around a public square for the purpose of providing a public place for the hitching of horses, while not nuisances within themselves, may be declared such by the municipal authorities having charge of the streets, on the

ground that their use for the purposes designed will create a nuisance. *Mercer County v. City of Harrodsburg*, (Ky.) 66 S. W. Rep. 10 (23 Ky. Law Rep. 1744). A saloon operating under a license from the state and a town is not a nuisance per se, and not a thing or occupation that must necessarily become a nuisance; and it is not within the power of the town authorities to single out a certain saloon, arbitrarily declare it a nuisance, and order it closed. *De Blanc v. Mayor, etc., of Town of New Iberia*, 106 La. 680 (31 So. Rep. 311; 56 L. R. A. 285). Kan. Gen. Stat. 1901, § 2493, declaring a place where intoxicating liquors are sold and kept for sale in violation of law, together with the property kept and used in maintaining such place, a common nuisance, is constitutional. *McManus v. State*, Kan. (70 Pac. Rep. 700). An obstruction to the erection of a building flush with the line of a lot, arising from the leaning over onto the lot of a building on an adjoining lot, may be abated as a nuisance. *Barnes v. Berendes*, 139 Cal. 32 (69 Pac. Rep. 491). A statute (Minn. Gen. Stat. 1894, § 2710) requiring railroad companies doing business in this state to furnish shippers of live stock, horses, cattle, sheep, etc., with proper facilities to convey and transport the same, does not authorize such companies to maintain stock yards in an improper manner, so as to constitute a nuisance, to the injury of adjacent property owners. *Anderson v. Chicago, M. & St. P. Ry. Co.*, 85 Minn. 337 (88 N. W. Rep. 1001). See opinion for particular stock yards held to be a nuisance. For a discussion of when the ringing of bells may be enjoined, see *State v. King*, 105 La. 731 (30 So. Rep. 101). For an exhaustive discussion of how far the constitutional right of acquiring and possessing property authorizes its use to the injury of another, see *Horan v. Byrnes*, N. H. (54 Atl. Rep. 945; 62 L. R. A. 602). The right to maintain a public nuisance can not be acquired by prescription. *Kelly v. Pittsburgh, C. C. & St. L. Ry. Co.*, 28 Ind. App. 457 (63 N. E. Rep. 233; 91 Am. St. Rep. 134).

Sec. 526. What constitutes a nuisance—Noise as a nuisance—Base ball park—Sunday base ball. The game of base ball not being a nuisance per se, the threatened erection of a base ball park adjoining a private residence can not be enjoined, *Alexander v. Tebeau*, (Ky.) 71 S. W. Rep. 427 (24 Ky. Law Rep. 1305); but persons living in the neighborhood of a base ball park may have an injunction against Sunday

ball games which are productive of such noises as appreciably disturb their rest and quiet, although they constitute a public nuisance and could be dealt with as such. *Golbough v. West Side Amusement Co.*, 64 N. J. Eq. 27 (53 Atl. Rep. 289). The court say: "Before going into the facts of the case, it may be well to allude briefly to the state of the law on the subject: That mere noise may be so great at certain times and under certain circumstances as to amount to an actionable nuisance, and entitle the party subjected to it to the preventive remedy of the court of equity, is thoroughly established. The reason why a certain amount of noise is or may be a nuisance is that it is not only disagreeable, but is also wears upon the nervous system, and produces that feeling which is called 'tired.' That the subjection of a human being to a continued hearing of loud noises tends to shorten life I think, is beyond all doubt. Another reason is that mankind needs rest and sleep, and noise tends to prevent both. But then noise is one of the necessary accompaniments of modern civilization, and men, as social beings, must of necessity subject themselves to whatever annoyance reasonably arises out of all those necessary and useful operations of society which do necessarily produce more or less noise. The ordinary hum of machinery, the noise of vehicles propelled along the public highways, and the like, are examples of this noise. And in considering whether a noise amounts to a nuisance, the question whether or not it is made for a necessary or useful purpose is always taken into consideration. Sometimes the language is, 'lawful or unlawful purpose'; and a noise which, if made to answer some useful purpose, might be held to be not a nuisance, will, if used for an unlawful or unnecessary purpose, be held to be a nuisance. So the time when a noise is made is also to be taken into account. Mankind needs sleep for a succession of several hours once in every 24 hours, and nature has provided a time for that purpose, to-wit, the night-time, and by common consent of civilized man the night is devoted to rest and sleep; and noises which would not be adjudged nuisances, under the circumstances, if made in the daytime, will be declared to be nuisances if made at night, and during the hours which are usually devoted by the inhabitants of that neighborhood to sleep. Then, again, the experience of mankind has shown that in addition to the ordinary rest which the workingman—whatever may be the nature of his work, mental or physical, or both—is supposed to obtain each night, he needs occasionally a

whole day of complete rest; and this day, by common consent, has been fixed by Christian peoples to be Sunday, or the first day of the week. In order to maintain that Sunday is a day of rest, we need not go into the question of its Divine origin, or rely upon the truth of the inspiration of the Bible. The fact is that there is an abundant ground to believe that the rest of one day in seven may have arisen out of the actual wants of mankind, irrespective of any Divine command. Therefore, by common consent, quite independent of any statutory regulation, it may be considered as settled that mankind is entitled to one day in seven for rest and quiet. But in addition to that, we have the sanction of what are called the 'Sunday Laws' of this state and of many other states, which positively prohibit all work and labor and amusements on that day. To that, again, an exception was made as to all those occupations which are deemed necessary, sometimes called 'works of necessity and mercy.' People travel about on Sunday, and, of late, railroad trains are permitted to run on Sunday. Domestic animals have to be provided for, and food for the use of man must also be provided, on that day. These, however, are exceptions to the general rule that all business must cease on Sunday. In obedience to this legislation, all ordinary business, including all public business, actually does cease on Sunday. For these reasons, it may be properly held that noises which would not be declared to be nuisances on a week day are held to be nuisances if made on a Sunday, because they have the effect of disturbing that quiet and rest which the citizen, wearied with six days of labor, is entitled to have for his rest and recuperation; and he is entitled to it not because the Sunday laws have declared the making of such noises to be unlawful, but because they do substantially interfere with his quiet enjoyment of the Sunday as a day of rest. But on the other hand, the fact that such noise not only does not tend to any useful purpose such as I have mentioned, but is in fact forbidden by the laws of the land, takes away from the producer of the noise any excuse whatever therefor.

Turning now to the facts in the present case: The complainants, Gilbough and Vredenburg, are residents in the city of Bayonne, in the county of Hudson. Their dwellings are situated near each other, in the residential portion of the city, near Newark Bay, at its junction with New York Harbor, and the bill is filed on behalf of themselves and other residents of the city. The defendant is a corporation under the

name of the West Side Amusement Company, and its objects, which are set out at great length in its articles of incorporation, are indicated by its title. In the month of August last, the defendant purchased several lots of land, lying in a body and making a block about 450 feet square, and situate from 1000 to 1200 feet from complainants' residences, and inclosed the same by a high board fence, and erected in one corner thereof a grand stand containing seating accommodations for several thousand spectators. On each successive Sunday in September and October it procured to be assembled there a large number of young persons, not only from the immediate neighborhood, but from the adjoining towns and cities, for whose admission it charged 25 cents each, and, as an attraction for the assembling of these persons, procured to be played base ball games. The persons who assembled were young, hilarious and enthusiastic, and when excited by witnessing the base ball games, indulged in loud shouts and stamping on the steps of the grand stand, thereby producing a noise so loud that it was heard at the complainants' houses, and at other parts of the city much more distant than those houses from the defendant's grounds. That the noises so produced, if loud enough to appreciably disturb complainants' rest, constitute a nuisance against which the complainants are entitled to relief in this court, follows necessarily from the principles above laid down. Some of the authorities applying more directly to the case are *Walker v. Brewster* (1867) L. R. 5 Eq. 25. There Vice Chancellor Wood (afterwards Lord Hatherley) reviews the earlier English cases up to that time, including *Soltau v. De Held*, 2 Sim. (N. S.) 133. Another case is *Inchbald v. Barrington*, (1869) 4 Ch. App. 388. The court there said: 'We have now before us evidence of the plaintiff and his wife, corroborated by that of seven independent witnesses, showing that the noise of the performances was heard inside the houses to such a degree as materially to interfere with the comfort of the inhabitants, according to ordinary habits of life. This evidence is uncontradicted, and I am of opinion that it established a case of nuisance, calling for the interference of this court.

* * * It is clear, however, from the evidence before us, which was not before Lord Cairns, that the music and noises in the circus were heard distinctly all over the plaintiff's house for several hours every night. This was something materially interfering with the comfort of the inhabitants, according to ordinary habits of life, and I am of opinion that the injunc-

tion in the suit of *Inchbald v. Barrington*, 4 Ch. App. 388, was rightly granted.' In this country we have *Tanner v. Trustees*, 5 Hill, 121 (40 Am. Dec. 337). There Judge Cowen reviews all the authorities up to that date, and holds that a bowling alley is a nuisance per se, by reason of its tendency to attract and accumulate a large number of disorderly persons. *Snyder v. Cabell*, 29 W. Va. 48 (1 S. E. Rep. 241), held that a skating rink was a nuisance. These were all cases of noises made on week days. The latest case on the subject of base ball games, in New Jersey, is *Cronin v. Bloemcke*, 58 N. J. Eq. 313 (43 Atl. Rep. 605), decided by Vice Chancellor Emery. The general subject is dealt with by Chancellor Williamson, in *Davidson v. Isham*, 9 N. J. Eq. 186; and by Chancellor Zabriske, in *Ross v. Butler*, 19 N. J. Eq. 294 (97 Am. Dec. 654), and again in *Cleveland v. Gaslight Co.*, 20 N. J. Eq. 201."

Sec. 527. What constitutes a nuisance—Storage of gunpowder—Use of dynamite in making excavations. The storage of gunpowder by a fuse manufacturer in quantities necessary for his business, which is located in a proper place and is conducted with the utmost care, is not a nuisance per se, so as to render him liable for injuries to neighboring property by the malicious explosion of the magazine by an employee. *Kleebauer v. Western Fuse & Explosives Co.*, 138 Cal. 497 (71 Pac. Rep. 617; 60 L. R. A. 377; 94 Am. St. Rep. 62).

A contractor excavating a tunnel for a city, who uses dynamite so near the property of another that the probable and natural result of an explosion will be an injury to such property, is liable for injuries caused, even by the vibration of earth or air, however high a degree of care he may have exercised in its use. *Fitzsimons & Connell Co. v. Braun*, 199 Ill. 390 (65 N. E. Rep. 249; 59 L. R. A. 421). The court say: "The performance of the work of excavating the tunnel underneath the buildings of a populous city with dynamite was intrinsically dangerous, no matter how carefully and skillfully the explosions were conducted. The nature and power of dynamite as an explosive have been demonstrated by universal experience, and it is a matter of common knowledge that the use of dynamite as an explosive is intrinsically dangerous, and of this the courts will take judicial notice. 17 Am. & Eng. Enc. Law (2d Ed.) 909; *Norwalk Gaslight Co. v. Borough of Norwalk*, 63 Conn. 527 (28 Atl. Rep. 32). In some jurisdictions (notably, New York and New Jersey) it has been

held that one who discharges blasts upon ground where he has the lawful right to blast, if he exercises due care in the process and manner of handling the explosive, is not liable for an injury to adjacent property caused by the mere disturbance of the earth or air, if no substance is thrown upon the premises so as to constitute a physical invasion of it. In New York—*Benner v. Dredging Co.*, 134 N. Y. 156 (31 N. E. Rep. 328; 17 L. R. A. 220; 30 Am. St. Rep. 649)—and Massachusetts—*Murphy v. City of Lowell*, 128 Mass. 396 (35 Am. Rep. 381)—the rule was announced that in the construction of public works, as by the general government or by cities, the contractors with government or municipal authorities could not be held liable for the vibrations caused by explosions, in the absence of proof of want of care in the performance of the work. But a different rule obtains in other jurisdictions. In California the opposing doctrine was stated in *Colton v. Oндardonk*, 69 Cal. 155 (10 Pac. Rep. 395; 58 Am. Rep. 556), thus: 'The fact that the defendant used quantities of gunpowder—a violent and dangerous explosive—to blast out rocks upon its lot contiguous to another person's, situate in a large city, must be taken as an unreasonable, unusual, and unnatural use of his own property, which no care or skill in so doing can excuse him from being responsible to the plaintiff for the damages he actually did to her dwelling house, as the natural and proximate result of his blasting, for an act which in many cases is in itself lawful becomes unlawful when by it damage has occurred to the property of another; and it would make no material difference whether that damage, resulting proximately and naturally from the act of blasting by the defendant, was caused by rocks thrown against Mrs. Colton's dwelling house, or by concussion of the air around it, which had either damaged or entirely destroyed it. The defendant seems by his contention to claim that he had the right to blast rocks with gunpowder on his own lot in San Francisco, even if he had shaken Mrs. Colton's house to ruins, provided he used care and skill in so doing, and although he ought to have known that by such act, which was intrinsically dangerous, the damage would be the necessary, probable or natural consequence; but in this he is mistaken.' The doctrine of this case was reaffirmed by the same court in *Munro v. Reclamation Co.*, 84 Cal. 515 (24 Pac. Rep. 303; 18 Am. St. Rep. 248). In *Bradford Glycerine Co. v. St. Mary's Wollen Mfg. Co.*, 60 O. St. 560 (54 N. E. Rep. 528; 45 L. R. A. 658; 71 Am. St. Rep.

740), the injury resulting from an explosive was by concussion or vibration; i. e., consequential injury. The supreme court of Ohio said: 'When the owner of a stone quarry, by blasting with gunpowder, destroys the building of an adjoining landowner, it is no defense to show that ordinary care was exercised in the manner in which the quarry was worked.' In that case the ground of liability invoked and asserted was the storing of nitroglycerine upon the defendant's own premises, and the court, in affirming a liability without regard to any negligence in the manner of storing and without distinction as to direct or consequential injury, and because of the inherent dangers of storing it at all, based its conclusions, by analogy, upon the rule as to blasting as above quoted. Mr. Thompson, in his Commentary on the Law of Negligence (volume 1, § 764) says decisions can be collected responding to three propositions: (1) If by an explosion dirt or stones are thrown upon the property of an adjoining owner, injuring such property, such owner may recover damages, irrespective of the question of negligence, since this is a trespass upon his property; (2) where the work of blasting is done in a situation where it is necessarily dangerous to the public, as in a thickly settled portion of a city, damages are recoverable without proof of negligence, for the reason that in such case the work is so inherently dangerous that the doing of it, no matter how carefully, is of itself negligence; (3) liability will attach to the person carrying on the dangerous work, where the work has been negligently done.

Though the law as to the liability arising in such instances does not seem to have been harmoniously declared in the courts of the different states to which we have referred, the rule in this jurisdiction was indicated by this court in the case of *City of Joliet v. Harwood*, 86 Ill. 110 (29 Am. Rep. 17). In that case it appeared that it was necessary, in the construction of a public work, that blasting of rocks should be done in a public street of a city. The contractor used all due care, skill and caution in performing the work of blasting. A stone was thrown by a blast against the building of the plaintiff, and injury thereby caused. Judgment was given against the city, and, in affirming, we said: 'In this case the work which the contractor was required by the city to do was intrinsically dangerous, however carefully or skillfully done. The right of recovery in this case does not rest upon a charge of negligence on the part of the contractor. It rests upon the fact that

the city caused work to be done which was intrinsically dangerous, the natural, though not the necessary, consequence of which was the injury to plaintiff's property. In such case the city is responsible.' It is true that in that case there was an actual invasion of the property of the plaintiff, the explosion having precipitated a rock against his building; but liability for injuries caused by actual invasion of the property, or by the concussion or vibration of the earth or air, are within the doctrine there announced. If one who, for his own purposes and profit, undertakes to perform a work, by means of explosives, inherently dangerous to the property of another, should be held liable for an injury occasioned by any substance cast by the explosives on the property of such other, it is only by the merest subtlety of reasoning he should be held not liable to respond for equal or greater damage caused by the concussion of the air or of the earth. There is no ground of substantial or practical distinction. The case of *Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.*, 60 O. St. 560 (54 N. E. Rep. 528; 45 L. R. A. 658; 71 Am. St. Rep. 740), may be regarded as authority for the view that liability in such cases is not restricted to an actual invasion of the property, but damages for consequential injuries may be recovered."

Sec. 528. What constitutes a nuisance—Stable in city or town. A private house stable erected on the building line of a city street is not a nuisance per se, and will not be enjoined as such, on account of being in violation of a city ordinance, at the instance of one who does not show special or irreparable injury resulting to him from such erection. *King v. Hamill*, 97 Md. 103 (54 Atl. Rep. 625). The erection of a private stable on a town lot near a church can not be enjoined as a nuisance per se. *Albany Christian Church v. Wilborn*, 112 Ky. 507 (66 S. W. Rep. 285; 23 Ky. Law Rep. 1820). The court say: "In *Dargan v. Waddill*, 31 N. C. 244 (49 Am. Dec. 421), Chief Justice Ruffin said: 'It is true that a stable in a town is not, like a slaughter house or a sty, necessarily and prima facie a nuisance. There must be places in towns for keeping the horses of the people living in them or resorting thither, and, if they do not annoy others, they are both harmless and useful erections. But on the contrary if they be so built, so kept, or so used as to destroy the comfort of persons owning and occupying adjoining premises, and impair their value as places of habitation, stables do thereby become nuis-

ances.' In *Kirkman v. Handy*, 11 Humph. 406 (54 Am. Dec. 45), the court said (refusing to grant an injunction in a case of this character): 'We have been referred to no case in which a stable of any sort, whether public or private, wherever situated, has been held to be, ipso facto, a nuisance.' In *St. James' Church v. Arrington*, 36 Ala. 546 (76 Am. Dec. 332),—a case not unlike this,—the court said: 'A private stable near a church does not belong to the class of erections which are unavoidably and in themselves nuisances. That it may become a nuisance is, no doubt, true; but the question whether or not it will prove to be one depends in a great measure upon its proximity to the church, the manner in which it shall be built, the number of horses placed in it, and the degree of care with which it may be kept. * * * Whenever it is legally ascertained that it has become a nuisance, a court of equity will protect by injunction any party injured thereby. But as in the present case it is yet uncertain, and remains to be ascertained from future events, whether or not the erection will become a nuisance, there is no ground for an injunction arresting the further progress of the building, or its appropriation to the use intended.' To same effect, see *Keiser v. Lovett*, 85 Ind. 240 (44 Am. Rep. 10), and cases cited: This subject was fully investigated by this court in *Pfingst v. Senn*, 94 Ky. 556 (23 S. W. Rep. 358; 21 L. R. A. 569; 15 Ky. Law Rep. 325); and it was there held that an injunction will not be granted against a threatened nuisance when the thing complained of is not such per se, but may or may not become so according to circumstances, and in this case a number of previous cases are collected. The private barn or stable which appellee was proposing to erect was not a nuisance in itself. It was unobjectionable, unless it was so kept as to cause annoyance or discomfort to the adjoining proprietors. If appellee kept in his barn stock in such numbers or in such manner as to inflict damage upon appellants, he would be liable; but he can not for this reason be enjoined from the erection of a building which might never be a source of injury to any one."

Sec. 529. What constitutes a nuisance—Discharging accumulations of rain or ice. The unauthorized casting of water upon lands which have not been condemned, even though done by public authority, may create a nuisance which is remediable. *Merritt Tp. v. Harp*, 131 Mich. 174 (91 N. W. Rep. 156). The maintenance of a tower on a building by the

owner thereof in such a way that ice formed on it from freezing rain or spray from a cataract nearby, and which falls onto an adjoining building in such quantities as to endanger human life and endanger the building, may be enjoined as a nuisance by the owner of such building. *Davis v. Niagara Falls Tower Co.*, 171 N. Y. 336 (64 N. E. Rep. 4; 57 L. R. A. 545; 89 Am. St. Rep. 817). The court say: "The law with reference to rain fall seems well settled. So long as the owner of land leaves it in its natural condition, he is not required to adopt any measures to prevent the flowage of surface waters from his premises on the adjoining land (*Vanderwiele v. Taylor*, 65 N. Y. 341), but when he puts a structure on the land a contrary rule prevails. Then he must take care of the water that falls on his premises, except in the case of extraordinary storms. In Washb. Easem. p. 390, it is said of the right to eaves' drip: 'It grows out of the fact that for one to construct the roof of his house in such a manner as to discharge the water falling thereon in rain upon the land of an adjacent proprietor is a violation of the right of such proprietor, if done without his consent, and this consent must be evidenced by express grant or prescription.' In *Bellows v. Sackett*, 15 Barb. 96, it was held that the defendant could not maintain a building upon his lot, the water falling from the roof of which injured the plaintiff's building, whether the water actually fell in the first instance on the defendant's land or not. In *Walsh v. Mead*, 8 Hun, 387, it was held that, where the roof of a building was so constructed as to render the snow falling upon it liable to be precipitated on the sidewalk without an adequate guard at the edge to retain it, it is in law a nuisance. The doctrine of *Bellows v. Sackett*, 15 Barb. 96, was followed in *Jutte v. Hughes*, 67 N. Y. 267. There this court said: 'The proof showed that the defendant had paved the yard, thus causing the water to accumulate, and render the yard less penetrable to the same, and conducted from the roofs of his houses to the privy in leaders and drains an unusual quantity of water beyond the capacity of the drains to carry away. This he had no right to do, and he was bound to take care of such water as fell and accumulated upon his own premises, and to prevent its causing any injury to the property of the plaintiff. *Bellows v. Sackett*, 15 Barb. 96; *Foot v. Bronson*, 4 Lans. 51. It matters not that the defendant did all that he reasonably could do to take the water off, if he suffered it improperly to increase on his own premises, and so as to

flow on the plaintiff's premises.' The decisions in other states appear to be uniformly to the same effect. In *Shipley v. Fifty Associates*, 106 Mass. 194 (8 Am. Rep. 318), it was held that maintaining a building with a roof constructed so that snow and ice collecting on it from natural causes will probably fall onto an adjoining highway renders the owner liable to a person injured. It was there said: 'It is not at all a question of reasonable care and diligence in the management of his roof, and it would be of no avail to the party to show that the building was of the usual construction, and that the inconvenience complained of was one which, with such a roof as his, nothing could prevent or guard against. He has no right so to construct his building that it will inevitably, at certain seasons of the year, and with more or less frequency, subject his neighbor to that kind of inconvenience, and no other proof of negligence on his part is needed. He must, at his peril, keep the ice or the snow that collects upon his roof within his own limits, and is responsible for all damages if the shape of his roof is such as to throw them upon his neighbor's land, in the same manner as he would be if he threw them there himself.' In *Gould v. McKenna*, 86 Pa. 297 (27 Am. Rep. 705), the plaintiff's building was higher than the defendant's rear building, on the roof of which, on account of the height of adjacent buildings, water accumulated, and soaked through the plaintiff's wall. The defendant was held liable, and it was there said: 'Having pitched his roof so as to carry the rainfall against and into the wall, it was his duty to raise the apron or flushing so high as effectually to protect the plaintiff's store from being flooded by the water thus brought down. He had no right to carry the rainfall on his premises into and upon the premises of the plaintiff. This was a wrongful act, which he could not justify by averring the openness of the wall of the plaintiff.' In *Tanner v. Volentine*, 75 Ill. 624, it is said: 'It is well settled that, if the owner of a building causes the water to flow from the roof upon the lot or ground of another, such other may recover of him for the damages sustained, unless prevented by some agreement.' *Hazeltine v. Edgmand*, 35 Kan. 202 (10 Pac. Rep. 544; 57 Am. Rep. 157), is to the same effect. It is to be observed that the structure of the tower is not on the division line between the land of the plaintiffs and that of the defendant, and therefore the ice that is formed on the posts, beams, and girders is accumulated wholly on the defendant's land. If the shape

of the tower was such that rain falling on the defendant's premises would run down the posts and then be cast on plaintiffs' building, plainly, under the authorities cited, the defendant would be liable. It can make no difference on the question of the defendant's liability that the water, instead of being precipitated on the plaintiffs' land, is allowed to congeal and freeze and fall in the form of ice. Nor is it material on the question of liability whether the ice proceeds from the fall of rain or from the spray and mist of Niagara Falls. The latter is just as much a natural phenomenon as the former. In climates where at certain seasons of the year the rain falls in the form of snow, the owner of land must build his structures with guards that would be unnecessary in places where there is no fall of snow. Likewise, where a structure is built so near Niagara Falls as to be subject to the precipitation thereon of spray and water from the falls, the owner is bound to take the necessary precautions against casting the water which falls on his own premises or the ice that is formed therefrom upon those of his neighbor."

Sec. 530. What constitutes a nuisance—Encroachment or obstruction upon highways and streets. The encroachment of a building or the pillars on which it rests, upon a public street or sidewalk, is a nuisance, the right to maintain which can not be authorized by a municipal grant, and which may be enjoined by an adjoining owner. *First Nat. Bank v. Tyson*, 133 Ala. 459 (32 So. Rep. 144; 59 L. R. A. 399; 91 Am. St. Rep. 46). See opinion for exhaustive discussion of this subject. It is a nuisance for a railroad company to leave its cars standing upon a street crossing, or use such crossing as a place of deposit or storage for its cars, and thus obstruct public use of the crossing. *Town of Mason v. Ohio River R. Co.* 51 W. Va. 183 (41 S. E. Rep. 418). The rights conferred on the rapid transit commissioners by N. Y. Laws 1892, ch. 556, § 4; Laws 1896, ch. 729, § 39, do not authorize sub-contractors on the subway improvement in the city of New York to erect and maintain at a public place on a paved street large structures for the storage of tools, where this necessity could be accommodated in other ways; and the proprietors of a hotel in the immediate neighborhood who suffer serious loss on account of such structures may recover damages and have an injunction against them as a nuisance. *Bates v. Hol-*

brook, 171 N. Y. 460 (64 N. E. Rep. 181). See conflicting opinions for discussion of the subject.

Sec. 531. What constitutes a nuisance—Maintaining obstruction in highway placed there by another. A street railway company constructing and maintaining for the use of the public a platform around the stump of an electric light pole, within the limits of a public street, but placed there by another, is not liable for injuries to one falling over it while hurrying to catch a car. *Lucas v. St. Louis & S. Ry. Co.*, 174 Mo. 270 (73 S. W. Rep. 589; 61 L. R. A. 452). The court say: "It did not put the pole or stump there. It was under no obligation to remove it. It has done nothing to keep it there, or to prevent it from falling or declining. The pole was put there by the lighting company, and was cut down and the stump left there by that company, and the stump has kept itself there ever since. It is located upon a public highway. It was there before there was any platform. Neither the wooden nor the granitoid platform affected the stump, or the dangers arising therefrom, in any manner whatever. If an owner raises up, or permits any one else to do so, or keeps or fails to remove, a nuisance, on his own premises, by which any one suffers injury, he is liable, because he violates his duty as a citizen. If any one creates a nuisance on a public highway, he is primarily liable to any one who is injured thereby, because he has violated his duty as a member of society, and has been guilty of a wrongful act for which he is primarily liable. But no citizen is under any personal, legal obligation to remove a nuisance from a public highway, notwithstanding he may know it is calculated to do injury to a traveler on the highway if it is allowed to remain there. To make any man liable for a tort, he must have done or omitted to do a duty imposed upon him by the law. In the absence of such a duty, there is no liability. The law imposes no duty upon the defendant to remove a nuisance in a public highway which it did not put there, and has nothing more to do with than any other citizen. The building the platform around the stump neither increased nor diminished the danger. The proximate cause of the accident in this case was the stump. The platform in no way had anything to do with the accident. The proximate cause would be the same whether there had been a platform there, or whether it had been allowed to remain a dirt walk, as it was when the pole was put up, when it was

sawed off, and when the stump was left there. The defendant maintains the platform, but it does not maintain the stump. The stump, and not the platform, caused the accident. The only thing the defendant did with respect to the stump was to leave it in the highway, where some one else had placed it; and, being under no legal duty to remove it, it can not be adjudged guilty of negligence in failing to remove it, or in building the platform around it.

All of the adjudicated cases wherein a citizen has been held liable for an obstruction or nuisance in a highway have been cases where the person held liable placed the obstruction or nuisance on the highway, or was under some duty to remove it. *Schweickhardt v. St. Louis*, 2 Mo. App. 571; *Waltemeyer v. Kansas City*, 71 Mo. App. 354; *Donoho v. Vulcan Ironworks*, 75 Mo. 401; *Wiggin v. St. Louis*, 135 Mo. 558 (37 S. W. Rep. 528); *Grogan v. Foundry Co.*, 87 Mo. 321; *Merrill v. St. Louis, et al.*, 83 Mo. 244, 255 (53 Am. Rep. 576); *Campbell v. Pope*, 96 Mo. 468 (10 S. W. Rep. 187). Of course, if one creates the nuisance, and another adopts it, and continues it, and keeps it up, as where one constructs a coal hole in a sidewalk, and another uses it and maintains it, both are liable. *Merrill v. St. Louis*, 83 Mo. 244, 255, 256 (53 Am. Rep. 576). The general rule is thus stated in 2 *Smith's Modern Law of Municipal Corporations*, § 1525: 'The general rule is that the primary duty to keep streets and highways in repair rests upon the municipal corporations within whose limits they are, this duty being implied in the acceptance of a charter from the state. Such duty is not discharged by the fact that the duty is also imposed upon abutting owners to keep the highway in repair in front of their land. A lot owner's obligation to repair streets or sidewalks does not exist at common law, but is statutory or arises from contract. It seems well settled that the neglect of an abutting owner to keep the sidewalk in repair, and to keep it free from snow and ice, as required by a city ordinance, does not render him liable to a party injured or to the city himself, *unless such owner himself caused the defect.*' (The italics are added.) In support of the text the author cites *St. Louis v. Insurance Co.*, 107 Mo. 92 (17 S. W. Rep. 637; 28 Am. St. Rep. 402), and cases from New York, Massachusetts, Wisconsin, New Jersey, Maryland, Rhode Island, Connecticut, California, Kansas, and Iowa. This defendant never caused this defect in the sidewalk; never adopted it, used it, continued it, or maintained it. It did not

remove it, it is true, but it owed no duty to the city or its citizens to remove it. It was neither the active, primary, nor remote cause of its being there, and it did not keep it there for its own use or benefit or at all. It simply left it where it found it, and let it remain in no more dangerous condition than it was when it found it."

Sec. 532. Injunction by property owner against nuisance—Obstruction of highway. An individual can not have an injunction against the erection of a building contrary to an ordinance of a town unless he shows that the erection will work special and irreparable injury to him and his property. *King v. Hamill*, 97 Md. 103 (54 Atl. Rep. 625). An owner of stock pens which a municipality is seeking to abate as a public nuisance, who seeks to enjoin such abatement, must, on the rule of clean hands, allege that they were not a public nuisance, and on this issue he has the burden of proof; and he can not justify their maintenance, if they are a nuisance, by proving that others in the same vicinity maintain similar nuisances. *Pittsburg, C. C. & St. L. Ry. Co. v. Town of Crothersville*, 159 Ind. 330 (64 N. E. Rep. 914). The obstruction of a street is a public nuisance which can not be restrained by an individual unless he suffers therefrom a special and particular injury distinct from that suffered by him in common with the public at large; and mere inconvenience in going from the street in front of his house to a particular part of the city does not constitute such a special injury. *Guttery v. Glenn*, 201 Ill. 275 (66 N. E. Rep. 305). An abutting owner, the value of whose property is especially injured by an adjoining owner encroaching upon the highway by the erection of a building, may maintain an action to abate the nuisance and recover his damages, and he does not lose his right to a mandatory injunction to remove the obstruction from mere silence during the construction of the building, unless for such length of time as will authorize the presumption of a grant. *Ackerman v. True*, 175 N. Y. 353 (67 N. E. Rep. 629).

Sec. 533. Remedies and proceedings against nuisances. The abatement of a nuisance, and recovery of damages predicated thereon and incident thereto, constitute but one cause of action; and, where suit has been brought to abate a nuisance, the judgment entered therein is a bar to a subsequent proceeding for damages based upon the same facts. In such

case it is immaterial that no attempt was made to recover damages, or that the pleading in the prior case was insufficient in that respect. *Gilbert v. Boak Fish Co.*, 86 Minn. 365 (90 N. W. Rep. 767; 58 L. R. A. 735). That the state, by statute or common law, can proceed, and has hitherto proceeded, by criminal prosecution to punish for the maintenance of a common nuisance, and also to abate the nuisance, does not prevent the legislature authorizing it to proceed in equity to restrain, enjoin, or abate such nuisance by the use of the equity writ of injunction. *Davis v. Auld*, 96 Me. 559 (53 Atl. Rep. 118). The fact that a city having ordinances punishing the maintenance of nuisances and power to abate them, permits the continuance of a nuisance on private property within its limits, but to the creation of which it in no wise contributed, does not make it liable to indictment and fine for permitting a nuisance. *City of Georgetown v. Commonwealth*, Ky. (73 S. W. Rep. 1011; 24 Ky. Law Rep. 2285).

See opinion for review of authorities on this subject. The termination of the estate of a lessee, accompanied by his vacation of the premises, during the pendency of an action to restrain a nuisance and recover damages, in which he has joined with others in order to prevent a multiplicity of suits, reduces the action to a mere legal claim for damages without any equitable features, and in which the defendant is entitled to a trial by jury, unless it has been waived. *McNulty v. Mt. Morris Electric Light Co.*, 172 N. Y. 410 (65 N. E. Rep. 196). Ga. Laws 1899, p. 73 construed and applied—injunction against liquor nuisance—"blind tiger." *Cannon v. Merry*, 116 Ga. 291 (42 S. E. Rep. 274). Kan. Laws 1901, ch. 165, § 4; ch. 232; Gen. Stat. 1901, § 2463, 2493, construed and applied—procedure for abatement of liquor nuisance. *J. D. Iler Brewing Co. v. Campbell*, 66 Kan. 361 (71 Pac. Rep. 825); *State v. Estep*, 66 Kan. 416 (71 Pac. Rep. 857); *State v. Engleman*, 66 Kan. 340 (71 Pac. Rep. 859). Me. Rev. Stat., ch. 17, § 1, as amended by Laws 1891, ch. 98, construed and applied—buildings where intoxicating liquors are illegally sold, as nuisances—procedure. *Davis v. Auld*, 96 Me. 559 (53 Atl. Rep. 118). For particular cases determining sufficiency of indictment and questions of practice in criminal prosecution for maintenance of nuisance, see *State v. Uvalde Asphalt Pav. Co.*, 68 N. J. L. 512 (53 Atl. Rep. 299); *West v. State*, Ark. (71 S. W. Rep. 483); *State v. Shaffer*, 31 Wash. 305 (71 Pac. Rep. 1088), construing and applying Bal. Ann. Wash.

Codes & Stat., §§ 3084, 3085. For case determining particular questions as to admissibility of evidence in action against a lessor of premises for damages resulting from the operation of a roundhouse thereon, see *Louisville & N. Terminal Co. v. Jacobs*, 109 Tenn. 727 (72 S. W. Rep. 954; 61 L. R. A. 188).

Sec. 534. Action for nuisance—Damages recoverable—Injuries resulting from noisome gases and offensive odors. Where the erection and operation of a neighboring coal hoist operates to the discomfort of a property owner and his family and depreciates the value of his property, damages for both may be recovered in one action. *Daniel v. Ft. Worth & R. G. Ry. Co.*, 96 Tex. 327 (72 S. W. Rep. 578). The court say: "If the plaintiff was entitled to recover upon the evidence, the right of recovery is not limited to the depreciation in the value of the property, but he may recover damages for the discomfort of himself and family in the use of the home caused by the erection and use of the coal hoists. *Bal. & Potomac R. R. Co. v. Fifth Baptist Church*, 108 U. S. 335 (2 Sup. Ct. Rep. 719; 27 L. Ed. 739); *Randolf v. Bloomfield*, 77 Ia. 52 (41 N. W. Rep. 562; 14 Am. St. Rep. 268); *Illinois Cent. R. Co. v. Katherine Grabill*, 50 Ill. 241; *Pierce v. Wagner*, 29 Minn. 355 (13 N. W. Rep. 170); *Brown v. C. & A. Ry. Co.*, 80 Mo. 457; *Penn. Ry. Co. v. Angel*, 41 N. J. Eq. 316 (7 Atl. Rep. 432; 56 Am Rep. 1)."

The owner of property occupied by him as a dwelling may recover compensation for any annoyance and discomfort occasioned by the surrounding air being permeated with noisome gases and offensive odors arising from the operation of chemical works by another in the immediate neighborhood; and, in fixing the amount of damages to be awarded in such a case, proof of depreciation in rental value of the dwelling house, caused by such nuisance, may be looked to as furnishing a proper evidentiary guide for determining the extent of the annoyance and discomfort actually suffered. *Swift v. Broyles*, 115 Ga. 885 (42 S. E. Rep. 277; 58 L. R. A. 390). The court say: "Undoubtedly, it was his right to receive additional compensation for any annoyance or discomfort occasioned by the air in and about his dwelling house being permeated with noisome gases and offensive odors discharged from the defendant's fertilizer plant. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317 (27 L. Ed. 739); *Railroad Co. v. Graybill*, 50 Ill. 241; *Graessle v. Carpenter*, 70

Ia. 166 (30 N. W. Rep. 392); *Weston v. Iron Co.*, 13 Allen, 95 (90 Am. Dec. 181); *Emery v. City of Lowell*, 109 Mass. 197; *Pierce v. Wagner*, 29 Minn. 355 (13 N. W. Rep. 170); 1 Wood, Nuis. (3d Ed.) § 511; 2 Wood, Nuis. (3d Ed.) §§ 561-563. Where there is such a wrongful interference with 'the comfortable enjoyment of property by a person in possession, no precise rule for ascertaining the damage can be given, as, in the very nature of things, the subject-matter affected is not susceptible of exact measurement; therefore the jury are left to say what, in their judgment, the plaintiff ought to have in money, and what the defendant ought to pay, in view of the discomfort or annoyance to which the plaintiff and his family have been subjected by the nuisance.' See section 866 of the volume last cited. It is not, of course, the policy of the law that the jury shall be permitted to act arbitrarily in the matter. On the contrary, they are expected to observe the cardinal rule that only actual damages can lawfully be recovered by the injured party. To the end that they may be enabled to arrive at a just and reasonable conclusion as to the amount of compensation to be awarded him, the courts have with marked unanimity held that the jury may consider proof of, and adopt as the measure of, his damages, the depreciation in rental value of his property, caused by the discomforts to which its use has been subjected. *City of South Bend v. Paxton*, 67 Ind. 228; *Francis v. Schoelkopf*, 53 N. Y. 152; *Weil v. Stewart*, 19 Hun, 272; *Beir v. Cooke*, 37 Hun, 38; *Michel v. Board*, 39 Hun, 47; *Pinney v. Berry*, 61 Mo. 360; *Loughran v. City of Des Moines*, 72 Ia. 382 (34 N. W. Rep. 172); *Shirley v. Railway Co.*, 74 Ia. 169 (37 N. W. Rep. 133; 7 Am. St. Rep. 471). One who himself occupies premises of which he is the owner can not, it is true, logically be said to have suffered any actual loss of rent by reason of a tortious interference with the enjoyment of his home. The decisions just cited are not, however, based upon any such erroneous theory, but rest upon the perfectly rational doctrine that the owner of property of a given rental value is entitled, if he elects to be at once his own landlord and tenant, to get an amount of enjoyment out of it equal to the sum he would be obliged to pay as rent for premises, of a like rental value, belonging to another. See, in this connection, the remarks of Smith, P. J., in *Michel's Case*, *supra*. We have been able to find but one case, that of *Potter v. Froment*, 47 Cal. 165, in which this doctrine has been repudiated. It is further to be observed that the recovery by

the injured party is not to be limited to the depreciation in rental value of his premises if he shows that he has been put to expense on account of sickness in his family caused by the nuisance complained of. *Loughran v. Des Moines*, 72 Ia. 382 (34 N. W. Rep. 172); *Brown v. Railroad Co.*, 80 Mo. 457; *Jarvis v. Railway Co.*, 26 Mo. App. 253. While, as was held in the case of *Kemper v. City of Louisville*, 14 Bush, 87, 'no recovery can be had for physicians' bills paid, or loss of time on the part of the occupants on account of sickness' thus produced, 'still these facts may be proved with a view of showing the extent to which' the plaintiff has been damaged by being wrongfully deprived of the natural comforts of his home; that is to say, proof of such facts, or of depreciation in rental value, can merely serve as an evidentiary guide in determining what amount of money will compensate him for the grievous wrong which the law seeks to redress, viz., the tortious invasions upon his legal rights of unmolested enjoyment of his property,—an injury which may or may not be attended with the incidents just mentioned. As was clearly pointed out in the opinion delivered by Beck, J., in *Randolf v. Town of Bloomfield*, 77 Ia. 52 (41 N. W. Rep. 563; 14 Am. St. Rep. 268): 'While rental value may be the subject of inquiry in some cases in order to determine the damages, it is plain that, when the enjoyment of a homestead [is] destroyed or diminished, the true rule for the measure of damages requires the owner to be compensated therefor.' The rental value of his premises may not be appreciably affected, or their value for rent may be actually enhanced by a demand for houses by the employes of the proprietors of the manufacturing enterprise which produces the nuisance; yet this can constitute no valid reply to the incontestable fact that his enjoyment of the comforts of his home has been wrongfully interfered with, to his legal injury. *Francis v. Schoelkopf*, 53 N. Y. 152. That the wrongdoer should not be permitted to 'take credit for such increase, by the way of indirect set-off against the direct loss or injury which he has occasioned,' was recognized by this court in *Davis v. Railway Co.*, 87 Ga. 612 (13 S. E. Rep. 567)."

Sec. 535. Municipal control. The power given a municipality to establish a sewerage system does not authorize it to create a nuisance in connection therewith. Mayor, etc., of *City of Waycross v. Houk*, 113 Ga. 963 (39 S. E. Rep. 577). The public have right to the use of a street in its en-

tirety, and a municipality has no power to authorize the permanent maintenance by an abutting owner of any structure extending into the street for any distance. *People v. Harris*, 203 Ill. 272 (67 N. E. Rep. 785; 96 Am. St. Rep. 304). See opinion for discussion of this subject. The power given a city by Ill. Rev. Stat., ch. 24, art. 5, § 62, subd. 75, to declare what shall be a nuisance and abate the same, authorizes it to declare any place within its bounds where hop ale, hop mead, malt mead, cider or other like drinks are kept for sale, are sold or given away, a nuisance. *Laugel v. City of Bushnell*, 197 Ill. 20 (63 N. E. Rep. 1086; 58 L. R. A. 266). *Burns' Ind. Rev. Stat.*, § 4357, subd. 4 construed and applied—power of town to declare what shall constitute a nuisance—particular ordinance held not to be a declaration that the pipes of a gas company in the streets of a town were a nuisance. *Rushville Nat. Gas Co. v. Town of Morristown*, 30 Ind. App. 455 (66 N. E. Rep. 179).

Sec. 536. Lessor and lessee—Rights and liabilities as to nuisances. A lessor is not liable for a nuisance resulting from the use of structures erected by him on the leased premises unless such nuisance necessarily arises from their proper use. *Louisville & N. Terminal Co. v. Jacobs*, 109 Tenn. 727 (72 S. W. Rep. 954; 61 L. R. A. 188). Where a nuisance originates from the use of the premises by a tenant in possession, an owner who is without right of re-entry during the term can not be charged with its maintenance; and a board of health can not give to such owner a right of re-entry that will make him chargeable with maintaining the nuisance created by the tenant. *State v. Local Board of Health*, N. J. L.

(52 Atl. Rep. 999). A tenant renewing his lease of premises after the creation by another, during his first term, of a nuisance injuriously affecting his right of occupancy, may sue to abate the nuisance and to recover the damages for his injuries; and he may recover as his damages the depreciation in the rental value of the premises occasioned thereby. *Parker, C. J. and Haight, J., dissenting. Bly v. Edison Electric Illuminating Co.*, 172 N. Y. 1 (64 N. E. Rep. 745; 58 L. R. A. 500).

PARTITION.

EPITOME OF CASES.

Sec. 537. Partition by agreement. After the death of a father, the rights of his children who have acquiesced in an arrangement by him in the nature of a family settlement, by which he designates certain of his real estate as the separate property of each, and each of them enters into the actual possession of the lands so allotted to them, respectively, are the same as if they had inherited the lands in common, and afterwards made by parol the same allotment their father made during his lifetime and in which they each acquiesced. *Hackleman v. Hackleman*, 199 Ill. 84 (65 N. E. Rep. 113).

Sec. 538. Who may have partition. The equitable right of redemption of a grantor in an absolute deed intended as a mortgage descends to his heirs and may be partitioned among them; but such partition will not be decreed where the right to redeem is barred by the statute of limitations or the laches of such grantor and his heirs. *Fitch v. Miller*, 200 Ill. 170 (65 N. E. Rep. 650). In Arkansas it is held that where lands are claimed by another, and held adversely, a suit in equity for partition will not lie; the remedy is in ejectment to settle the title before a bill for partition can be maintained. *Head v. Phillips*, 70 Ark. 432 (68 S. W. Rep. 878). The right to have partition of the lands of a decedent is not prevented by the fact that the probate court had ordered the executrix to take possession of the real estate and rent the same. *O'Brien v. Ash*, 169 Mo. 283 (69 S. W. Rep. 8). Partition of property by persons holding it under a will, made in violation of the testator's desire as expressed in the will, is not invalid. *Rapier v. O'Donnell*, 106 La. 98 (30 So. Rep. 256). A judgment plaintiff purchasing at an execution sale on his judgment an insolvent heir's undivided interest in an estate is not entitled to partition where such heir is indebted to the estate in excess of his interest. *Ayres v. King*, 168 Mo.

244 (67 S. W. Rep. 558; 90 Am. St. Rep. 452). A right of entry for condition broken, held by two or more persons, will not support partition or alternative judicial sale of the land involved. *Bouvier v. Baltimore & N. Y. R. Co.*, 67 N. J. L. 281 (51 Atl. Rep. 781; 60 L. R. A. 750). The heirs of an ancestor can not have partition of land conveyed by him to the trustees of a church with reversion to his heirs in case of abandonment without previously establishing the abandonment in ejectment. *In re Bishop's Estate*, 200 Pa. St. 598 (50 Atl. Rep. 156). Persons claiming under a will which gives them an undivided one-half interest in the property devised, making them cotenants with the testatrix's husband, although it purports to give them the entire estate, can not, through their possession of the property, claim to hold it adversely so as to defeat the husband's right to have partition. *O'Brien v. Ash*, 169 Mo. 283 (69 S. W. Rep. 8).

Sec. 539. Right to possession as prerequisite to the action—Joinder of action for partition and to recover real estate. In Kansas, one out of possession can not maintain an action for partition of real property against one in possession claiming title to the entire property, unless he first establishes his title and right of possession to a portion of the property in action for the recovery of real property, or joins a cause of action for the recovery of real property with his action for partition. *Denton v. Fyfe*, 65 Kan. 1 (68 Pac. Rep. 1074; 93 Am. St. Rep. 272); *Chandler v. Richardson*, 65 Kan. 152 (69 Pac. Rep. 168). In the first case the court say: "It is a settled doctrine of the common law that one joint tenant or tenant in common can not maintain a suit for partition unless he be in possession or seised of the lands when the suit is brought. *Adam v. Iron Co.*, 24 Conn. 230; *Tied. Real Prop.* § 262. In states having a code like ours, the rule of the common law has been adhered to. *Hutson v. Hutson*, 139 Mo. 229 (40 S. W. Rep. 886). In *Estes v. Nell*, 140 Mo. 639-650 (41 S. W. Rep. 940, 941), it is said: 'It is well established in this state that where one is in the possession of land, claiming it adversely against all others, one out of possession can not maintain a suit against him for partition without first establishing his right in an action of ejectment, but, after having done so, he may maintain his action for partition against the person or persons in possession.' See, also, *London v. Overby*, 40 Ark. 155; *Hardy v. Mills*, 35 Wis. 141; *Weston v. Stoddard*,

20 L. R. A. 624, and note on page 626. In the case last cited, which is found in 137 N. Y. 119 (33 N. E. Rep. 62; 33 Am. St. Rep. 697), it was held that prior to 1880, under the statutes of New York, a tenant in common of real property must wait until he has gained possession in an action or proceeding at law before he can insist upon a division of the property between himself and his cotenants. The case was decided, however, in 1893, under a statute which authorized the litigation in an action of partition of all questions of title between cotenants and their privies who might be parties to the action. In California, also, it was held, under a Code of that state, that a tenant in common who had never been in occupancy of the land might maintain a suit in partition against a cotenant whose possession was adverse or hostile. In the opinion the court says that their Code declares that any right, title, or interest in the land may be put in issue, tried and determined in the action. *Martin v. Walker*, 58 Cal. 590. See, also, *Peterson v. Fowler*, 73 Tex. 524 (11 S. W. Rep. 534). In the case of *Delashmutt v. Parrent*, 39 Kan. 548-557 (18 Pac. Rep. 712, 717), while the point raised here was not directly involved, the court said: 'The title of the plaintiff being disputed, ejectment was the appropriate, if not the only, remedy which could be employed to determine the title of the adverse claimants to the property. The theory of partition is that there is a common and undisputed ownership, by which the share of each owner is to be set off, or, if partition can not be made, the court may permit any one of the owners electing to take the same at an appraised value, or may order a sale of the property, and a division of the proceeds among the parties according to their respective interests. Some of the courts have gone to the extent of holding that the title of parties owning common property and claiming adversely must first be established by ejectment, before partition proceedings can be maintained. *Sedg. & W. Land Title*, § 166. Under our Code, however, the fact that the property is held adversely to the plaintiff will not defeat an action of partition, when brought in connection with, or as part of, another action for the recovery of real property. Under our rules of pleading, the two causes of action may be united in one action, or they may, when so pleaded, and no objection is made, be treated as a single cause of action. *Scarborough v. Smith*, 18 Kan. 399.'

Sec. 540. Partition proceedings—Right of defendant cotenants in action for partial partition. In an action of partition, brought by the grantee of one joint owner of the property against the other joint owners, wherein only a portion of the joint property is included, the defendant joint owners may, by answer in the nature of a cross demand for affirmative relief, have the entire joint estate, and all parties in interest therein, brought before the court, partition made, and the rights of all parties in interest determined, and protected by the decree. *Hazen v. Webb*, 65 Kan. 38 (68 Pac. Rep. 1096; 93 Am. St. Rep. 276). The court say: "In the case of *Parker v. Harrison*, 63 Miss. 225, Justice Campbell, in delivering the opinion of the court, said: 'The complainant was a cotenant of all the lands sought to be partitioned, and brought before the court the alienees of her former cotenants, so that their interests would be protected. Surely, they can not successfully complain of this. It is the right of one of several cotenants to convey his interest in the whole or a part of the joint estate, but this shall not prejudice the rights of a cotenant who has not aliened, and desires to obtain partition. It is not allowable for a cotenant to split the joint estate into fragments, and necessitate as many separate suits for partition as there may be conveyances. He who has a joint interest in the several parcels may proceed as if no conveyance had been made by any of his cotenants, and bring all parties in interest before the court, which will do justice between the parties according to their several rights.' In the case of *Barnes v. Lynch*, 151 Mass. 510 (24 N. E. Rep. 783; 21 Am. St. Rep. 470), it is said: 'A conveyance by one tenant in common of his interest in part only of the common estate will not authorize a cotenant to enforce partition of such part against the grantee, leaving the residue unpartitioned.' In *Grady v. Cannon*, 92 Wis. 666 (66 N. W. Rep. 808), it is held: 'One of several persons, who together inherited from the same person two tracts of land, may, without his complaint being open to the objection of improperly uniting several causes of action, maintain an action for the partition of the two lots against his co-heirs and persons to whom they have conveyed an interest in one or the other or both of the lots.' In *Grant v. Murphy*, 116 Cal. 427 (48 Pac. Rep. 481; 58 Am. St. Rep. 188), it is held: 'As a general rule, all the parties to a suit in partition are actors, each having the right to set up in his pleadings the nature and extent of his interest, and to have the same ascer-

tained and adjudicated by the interlocutory decree. This rule applies where the property must be sold for partition as well as in other cases, and a decree which does not adjudicate the interests of the respective parties is ordinarily erroneous.' In *Gore v. Dickinson*, 98 Ala. 363 (11 So. Rep. 743; 39 Am. St. Rep. 67), it is held: 'The court having acquired jurisdiction of the main question,—the real subject-matter,—it will ascertain the validity and extent of such conveyances, and so mold and adjust its decree as to meet all the equities of the parties growing out of their ownership of and relation to the property.' Mr. Knapp, in his work on Partition (page 25), says: 'The court, before it will order a sale of land in partition, requires that all those who have an interest in them shall be made parties to the action, to the end that the purchaser may get a perfect title.' At page 89 the same author says: 'It is a general rule that all persons who may in any way be interested in the lands sought to be partitioned shall be made parties to the action. * * * This rule also includes those who have a lien upon the land, or who may be interested in any mortgage, judgment, or mechanic's lien, or in fact any lien that may be actually valid against the premises.' See, also, *English v. English*, 53 Kan. 173 (35 Pac. Rep. 1107); *Barnes v. Boardman*, 157 Mass. 479 (32 N. E. Rep. 670)."

Sec. 541. Partition proceedings—Miscellaneous Notes.

A general allegation of ownership of land authorizes proof of title by adverse possession. *McArthur v. Clark*, 86 Minn. 165 (90 N. W. Rep. 369; 91 Am. St. Rep. 333). In Indiana it is held that the allowance for compensation for improvements in partition suits arises from the desire of the courts to be just, and is not dependent upon the occupying claimant's act or any other statute. *Pulse v. Osborn*, 30 Ind. App. 631 (64 N. E. Rep. 59). Where it appears that a necessary party is dismissed from a partition suit it is error for the court to proceed until such party is brought in. *Black v. Black*, 95 Tex. 629 (69 S. W. Rep. 65). A partition decree which adjudges ownership of property to be in one defendant subject to a lien in favor of another defendant, to a specified amount, for taxes and interest, should fix a definite period in which such amount should be paid. *Cramer v. Wilson*, 202 Ill. 83 (66 N. E. Rep. 869). A court, in rendering judgment in partition of joint property incumbered by many conflicting and overlapping specific and general liens, may make any order as to the sale of the property in

satisfaction of the liens and disbursements of the proceeds which the necessities of the case demand shall be made for the protection of the rights of the lienholders and the joint owners of the property, to the end that the decree rendered shall be an effectual and complete termination of the controversy. *Hazen v. Webb*, 65 Kan. 38 (68 Pac. Rep. 1096; 93 Am. St. Rep. 276). Judgment creditors and other incumbrancers are not necessary parties to a bill for partition, even where a sale of the premises is decreed, unless they be creditors of a deceased person who was a tenant in common, joint tenant, or coparcener. In other cases it is proper to sell the land subject to the liens. *Childers v. Loudin*, 51 W. Va. 559 (42 S. E. Rep. 637). Upon partition of the land of a decedent subject to a deed of trust given to secure a series of nine notes payable yearly, executed by him to his father and mother, and in which it is stipulated that their death shall operate as payment, made after payment of two of the notes, it is not proper to disregard the contingency of the death of the payees who are aged persons and charge the land with the full value of the notes; but the proper practice is to reserve a sufficient amount of the proceeds of the sale of the mortgaged land to meet the notes as they fall due, distribute the balance, and provide that if the payees die the remainder of the fund should be so distributed. *Stevens v. Stevens*, 172 Mo. 28 (72 S. W. Rep. 542).

Sec. 542. Partition proceedings—Statutes construed. Applying Cal. Const., art. 6, § 5, providing "that all actions for recovery of the possession of, quieting title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions is situated," it is held that an action to partition several distinct tracts of land lying in different counties may be brought in any county in which any of said tracts are situated. *Murphy v. Superior Court*, 138 Cal. 69 (70 Pac. Rep. 1070). *Hurd's Ill. Rev. Stat.* 1899, p. 1255, ch. 106, §§ 5, 16, 18 construed and applied—appointment and removal of commissioners—confirmation of report. *Donaldson v. Duncan*, 199 Ill. 167 (65 N. E. Rep. 146). 3 Starr & C. Ann. Ill. Stat. (2d Ed.) p. 2921, ch. 106, § 22 construed and applied—making partition subject to homestead—setting off homestead. *Turnage v. Craig*, 203 Ill. 167 (67 N. E. Rep. 762). Construing and applying Ind. Laws 1877, p. 43, ch.

31, and Burns' Ind. Rev. Stat., § 1201, it is held that the Superior Court of Allen county has jurisdiction to partition real estate in that county. *Romy v. Brannan*, 32 Ind. App. 146 (67 N. E. Rep. 998). Under Ia. Code, § 4250 a judgment lien holder is a necessary party and where he is not made a party he may insist on his lien. *Smith v. Piper*, 118 Ia. 363 (92 N. W. Rep. 56). Ky. Civ. Code, § 499 construed and applied—partition against infants. *Blue v. Waters*, Ky. (71 S. W. Rep. 889; 24 Ky. Law Rep. 1481). Under Me. Rev. Stat., ch. 88, § 4, a petition for partition can not be heard when notice has not been ordered or given to co-tenants, who are not named, but who are described as "unknown." *Savage v. Gray*, 96 Me. 557 (53 Atl. Rep. 61). 3 Mich. Comp. Laws 1897, §§ 11014, 11045, 11063, 11068 construed and applied—partition of lands in different counties—sale under suit brought in one county. *Morris v. Donovan*, 130 Mich. 336 (89 N. W. Rep. 963). The rules of pleading, practice, and evidence applicable to civil actions generally apply to an action for partition under Minn. Gen. Stat. 1894, ch. 74. *McArthur v. Clark*, 86 Minn. 165 (90 N. W. Rep. 369; 91 Am. St. Rep. 333). Miss. Code, §§ 3118, 3421 construed and applied—service by publication on nonresident defendant—right of absent defendant to open decree. *Moore v. Summerville*, 80 Miss. 323 (31 So. Rep. 793; 32 So. Rep. 294). A beneficiary or trustee in a mortgage executed by a party to a partition suit is not a necessary party to such suit, and persons claiming under such an instrument are bound by the judgment subsequently rendered in the action. *Mo. Rev. Stat. 1889, § 7160* applied. *Becker v. Strocher*, 167 Mo. 306 (66 S. W. Rep. 1083). Tex. Rev. Stat., arts. 3607, subd. 3; 3611, construed and applied—requisites of description in complaint and decree. *Black v. Black*, 95 Tex. 627 (69 S. W. Rep. 65). Under Va. Code, ch. 114 courts of equity have jurisdiction of suits for partition, and they are clothed with authority, where there are liens by judgment or otherwise, on the interest of any party, to apply the dividends of such party in the proceeds of sale to the discharge of such liens. *Grove v. Grove*, 100 Va. 556 (42 S. E. Rep. 312). Wis. Rev. Stat. 1898, §§ 3545, 3552 construed and applied—partition by arbitration. *Frankfurth v. Steinmeyer*, 113 Wis. 195 (89 N. W. Rep. 148).

Sec. 543. Partition proceedings—Trial of title in.
Upon issues properly joined, the adverse claims of title by

defendants who are not cotenants may be adjudicated. *Satterlee v. Kobbe*, 173 N. Y. 91 (65 N. E. Rep. 952). Issues may be formed in partition proceedings to establish and quiet titles among the parties, but in the absence of such issues there can be no adjudication beyond a division of the property. *Sauer v. Schenck*, 159 Ind. 373 (64 N. E. Rep. 84). Where all the parties claim under a common ancestor and the only disputed question is the extent of their several interests, which depends upon the proper construction to be given a will, this question can be determined in partition proceedings. *O'Hearn v. O'Hearn*, 114 Wis. 428 (90 N. W. Rep. 450; 58 L. R. A. 105).

Sec. 544. Partition proceedings—Effect of judgment.

A decree partitioning lands obtained by the owners of life estates therein which adjudges them to be the owners thereof in fee does not bar the remaindermen not made parties thereto from asserting their ownership in fee against purchasers of the fee from the partitioners. *Peterson v. Jackson*, 196 Ill. 40 (63 N. E. Rep. 643). Applying Mo. Rev. Stat. 1899, § 4386, providing that in proceedings for partition, the court shall "declare the rights, titles, and interests of the parties to such proceedings, petitioners as well as defendants," it is held that a partition decree which finds that a defendant has no interest in the premises is conclusive against him in favor of the plaintiff, in a subsequent action brought by such plaintiff against such defendant. *Bartley v. Bartley*, 172 Mo. 208 (72 S. W. Rep. 521).

Sec. 545. Partition proceedings—Allowance of costs and attorney's fees.

Costs can be awarded against a defendant, under Cal Code Civ. Proc., § 796, only after final judgment. *Harrington v. Goldsmith*, 136 Cal. 168 (68 Pac. Rep. 594). No costs should be adjudged against defendants brought in by allegations in plaintiff's complaint, where the final decree shows that they were entitled to all the property involved. *Chivers v. Race*, 196 Ill. 71 (63 N. E. Rep. 701). An allowance of attorney's fees can only be made when authorized by statute; and Ala. Code, § 3183, does not authorize such an allowance. *Jordan v. Farrow*, 130 Ala. 428 (30 So. Rep. 338). Burns' Ind. Rev. Stat., § 1222, authorizing an allowance of attorney's fees in suits for partition, does not apply where all the defendants appeared in the action and

contested the matters stated in the complaint, and for that reason derive no benefit from plaintiff's attorneys. *St. Clair v. Marquell*, 161 Ind. 56 (67 N. E. Rep. 693). The plaintiff's right to an apportionment of solicitor's fees, their value having been proved, among persons to whom property has been decreed, should not be refused on the ground that the original bill failed to state the title where it correctly set forth the record title at the time the bill was filed, but afterwards certain deeds and mortgages were placed of record by a mortgagee, who filed an answer showing his interest, and the bill was amended without injury to the heirs. *Mehan v. Mehan*, 203 Ill. 180 (67 N. E. Rep. 770).

Sec. 546. Payment of owelty—Effect of statute providing for partition sale. Parties to a partition who request the commissioners to set off a part of the premises to another upon his payment of owelty, as authorized by Mass. Pub. Stat., ch. 178, § 56 (Rev. Laws, ch. 184, § 41), and agree to the partition as thus made, waive their right to object to the failure of the commissioners to make a formal finding that the premises could not be partitioned in the ordinary manner without great inconvenience, as required by the terms of the statute. *Nichols v. Nichols*, 181 Mass. 490 (63 N. E. Rep. 1072).

A statute (R. I. Gen. Laws, ch. 265), providing for sale of land in order to effect partition, does not abrogate or limit the equitable power of courts to decree the payment of owelty. *Updike v. Adams*, 24 R. I. 220 (52 Atl. Rep. 991). This case is followed in *Robinson v. Robinson*, 24 R. I. 222 (52 Atl. Rep. 992). In the first case the court say: "The authorities seem to be almost unanimous that the general powers of courts of equity are broad enough to require a payment of this kind. *Story*, Eq. Jur. §§ 654, 657; *Pom.* Eq. Jur. § 1389; 2 *Daniell*, Ch. Pl. & Prac. § 1131; *Bisp.* Eq. (5th Ed.) § 492; *Tied.* Eq. Jur. § 523; *Adams' Eq.* p. 449; *Freem. Co-ten. & Part.* § 507; *Beach*, Mod. Eq. Jur. § 993; *Clarendon v. Hornby*, 1 P. Wms. 446; *Horncastle v. Charlesworth*, 11 Sim. 315; *Calhoun v. Rail*, 26 Miss. 414; *Martin v. Martin*, 95 Va. 26 (27 S. E. Rep. 810); *Oliver v. Jernigan*, 46 Ala. 41; *Hall v. Piddock*, 21 N. J. Eq. 311; *Cooter v. Dearborn*, 115 Ill. 509 (4 N. E. Rep. 388). The respondent does not deny the doctrine of these authorities, but claims that our statute (Gen. Laws, ch. 265), which provides for a sale of an estate, is in-

tended to apply to those cases where the division can not be exact, and that it thus operates as a limitation upon the general rule in equity by providing a substitute for it. We do not think this is so. While there is no reported decision in this state of a decree for the payment of owelty against objection, it has so often been required in decrees, without objection, that it seems to have been a generally accepted rule both by the court and bar. It is obviously impossible, in many cases, to divide an estate into parts of exactly equal value. Differences in buildings, location, water, wood, fertility, and other incidents affecting value, frequently need to be adjusted by a payment of money. It would be a greater stretch of power to require a large estate to be sold as a whole, where a proportionately small sum is required to meet such an adjustment, than to require the payment of such a sum. We can not think that the statute was intended to abrogate the power in such cases, and therefore that it is not in substitution for the general power, but in addition to it, to cover cases in which a payment of owelty is impracticable; for example, the division of a single house and lot between several parties."

Sec. 547. Partition sales. Lands occupied as a homestead by the widow and children of a decedent can not be sold for the purposes of partition subject to their homestead right. *Walker v. Walker*, 195 Ill. 409 (63 N. E. Rep. 271). Land is presumed to be divisible and to authorize a sale for division; it must be shown that it is indivisible without impairing its value. Ky. Civ. Code, § 490, subd. 2 construed and applied. *Talbott v. Campbell*, (Ky.) 67 S. W. Rep. 53 (23 Ky. Law Rep. 2198). It is the duty of the court, before decreeing a sale in a partition suit, to judicially determine the rights and interests of the cotenants in the land, and failure to do so is ordinarily reversible error. *Childers v. Loudin*, 51 W. Va. 559 (42 S. E. Rep. 637). A court of equity, having obtained jurisdiction of an action between the heirs of an intestate seeking to charge the interest of one of them in lands held by them in common with advancements made to him, it is no departure to order a sale of the lands for partition, and to divide the proceeds equitably among those entitled to them. In such a case the lien for the advancement is superior to the rights of the creditors of the heir against whom the advancement is charged. *Comer v. Shehee*, 129 Ala. 588 (30 So. Rep. 95; 87 Am. St. Rep. 78). Under Ala. Code, §§ 3161, 3187.

tenants in common of property which can not be equitably divided, whether their title be legal or equitable, may file a bill in equity for a sale of the property for the purposes of division. *Huntington v. Spear*, 131 Ala. 414 (30 So. Rep. 787). The power of the court to confirm or refuse to confirm a partition sale, given by Cal. Code Civ. Proc., § 766, is not an arbitrary power, but a sound judicial discretion which must be exercised with just regard to the rights of all concerned. See opinion for discussion of when confirmation will be withheld on account of inadequacy of price. *Dunn v. Dunn*, 137 Cal. 51 (69 Pac. Rep. 847). Construing and applying Mass. Pub. Stat., ch. 178, § 65, authorizing the sale "of the whole or any part of the lands that can not be advantageously divided," it is proper to take into account that the usefulness of certain parts of the land is dependent upon the right of flowage of water from other parts which right may not continue after the division. *Heald v. Kennard*, 180 Mass. 521 (63 N. E. Rep. 4).

A decree of sale rendered in a partition suit, to which all persons having any interest in the property were made parties, can not be avoided on the ground that a power of sale contained in the will of the common ancestor of the parties took away the right to maintain partition, that question being necessarily involved in the adjudication made by the court. *Parish v. Parish*, 175 N. Y. 181 (67 N. E. Rep. 298). When real estate is sold in such suit without a judicial ascertainment of the interests of the parties, and is purchased by a cotenant who never appeared in the cause, nor in any way aided in bringing the property to sale, and the sale is confirmed without objection, his title is protected by W. Va. Code, ch. 132, § 8, notwithstanding the decree was erroneous for failure of the court previously to determine the interests of the parties, and the cotenant parties must resort to the fund arising from the sale. *Childers v. Loudin*, 51 W. Va. 559 (42 S. E. Rep. 637). In Kentucky it is held that the reversal of a judgment of sale will not affect a sale made under the judgment before reversal. *Talbott v. Campbell*, (Ky.) 67 S. W. Rep. 53 (23 Ky. Law Rep. 2198).

PARTY WALLS.

EPITOME OF CASES.

Sec. 548. What constitutes a party wall—Use of wall—Municipal control of party walls. A wall between two adjoining properties erected and used as a party wall will be treated as such though wholly resting on one of them. *Bright v. Allen*, 203 Pa. St. 394 (53 Atl. Rep. 251; 93 Am. St. Rep. 769). Openings for windows made by one party in an existing party wall in violation of the rights of the other may lawfully be closed by him, provided no unnecessary injury is thereby done to the adverse party. *Bonney v. Greenwood*, 96 Me. 335 (52 Atl. Rep. 786). An adjoining lot owner making excavations on his lot preparatory to using a party wall is charged with the responsibility of any injury to the wall, and a lessee of an adjoining building has a right to rely on such owner discharging his duty as to protecting the wall. *Payne v. Moore*, 31 Ind. App. 360 (66 N. E. Rep. 483). A provision in a city charter giving it power to prescribe the depth of foundations of buildings and the thickness and materials used in the construction of the walls thereof, and which stipulates that no party wall shall be less than nine inches in thickness, does not authorize an ordinance permitting a lot owner to build a wall partly on the land of an adjoining owner without his consent. *Schmidt v. Lewis*, 63 N. J. Eq. 565 (52 Atl. Rep. 707). For exhaustive collation of authorities on "Party walls," see 89 Am. St. Rep. 924-945.

Sec. 549. Agreements concerning party walls—Contribution. The owner of a wall, not strictly a party wall, may make it such by agreement with an adjoining owner, and where the latter has paid the compensation fixed by the agreement for the use of the wall and begun the erection of his building, such owner can not return the money and enjoin the use of the wall. *Lukens v. Lasher*, 202 Pa. St. 327 (51 Atl.

Rep. 887). In construing an agreement by a purchaser of a lot, made with his vendor who owned an adjoining lot, to erect on the lot purchased a three-story building with a wall on the boundary, with apertures for joists to be used by the vendor at any time he might choose to erect "a building of like dimensions," it is held that the quoted phrase refers only to the extent to which the joist apertures should be let into the wall, and does not impose any limit upon the dimensions of the building to be erected by the vendor. *Lagomarsino v. Crowe*, 134 Ala. 377 (32 So. Rep. 661). The mere fact that an adjoining owner makes use of a party wall rebuilt and standing partly on his land, but the rebuilding of which he has not agreed to contribute to, nor induced by countenancing an expectation of contribution, will not render him liable for part of its cost. *Griffin v. Sansom*, 31 Tex. Civ. App. 560 (72 S. W. Rep. 864).

PLATS AND SURVEYS.

EPITOME OF CASES.

Sec. 550. Maps and plats—Rule where there is a variance between survey and plat. The original plat of a survey may always be used in evidence to show the position of the land, and is evidence of the most potent kind in determining the location of the lines and corners. *Bell County Land & Coal Co. v. Hendrickson*, (Ky.) 68 S. W. Rep. 842 (24 Ky. Law. Rep. 371). Real estate owners in a town are bound to take notice of the provisions of an act of the legislature, (Va. Laws 1845-46, p. 139) incorporating it, concerning the establishment of streets and the making and recording by the trustees of the town of a plat and survey thereof. *McClellan v. Town of Weston*, 49 W. Va. 669 (39 S. E. Rep. 670; 55 L. R. A. 898). When lots of land have been granted, designated by numbers, according to a plan referred to, which has resulted from a survey actually made and marked upon the face of the earth, the lines and corners fixed by that survey determine the extent and bounds of the respective lots. *Coleman v. Lord*, 96 Me. 192 (52 Atl. Rep. 645). In discussing the rule where

there is a variance between the survey of a city addition and a plat thereof, the supreme court of Washington, in the case of *Olson v. City of Seattle*, 30 Wash. 687 (71 Pac. Rep. 201), say: "Where there is a discrepancy between the survey and the plat, the survey controls, when it can be ascertained, and the proof here is overwhelming that the boundaries of the lots as claimed by and in possession of the respondents are in exact accord with the original survey. The intention of one who has platted land into lots and blocks is indicated by the monuments which he has caused to be placed, marking the boundaries of the same, and another has a right to purchase from him with reference thereto, and such monuments and boundaries can not be changed by showing that they do not conform to the plat on file. Lots in cities and towns are not held by such precarious tenure. *Root v. Town of Cincinnati*, 87 Ia. 203 (54 N. W. Rep. 206); *City of Racine v. J. I. Case Plow Co.*, 56 Wis. 539 (14 N. W. Rep. 599); *Holst v. Streitz*, 16 Neb. 249 (20 N. W. Rep. 307); *Burke v. McCowen*, 115 Cal. 481 (47 Pac. Rep. 367); *Fleischfresser v. Schmidt*, 41 Wis. 223."

Sec. 551. Surveys and surveying. A line should not be deflected except in order to conform to the intentions of the parties; and, if possible, a line should be construed to mean a continuous line. *Jackson v. Welsh Land Ass'n*, 51 W. Va. 482; (41 S. E. Rep. 920). The power to make and correct surveys of public lands belongs exclusively to the political department of the general government, and a plat of a survey made and approved by that department can not be impeached in the courts, except upon a direct proceeding for that purpose. *McBride v. Whitaker*. Neb. (90 N. W. Rep. 966). If the location of a section and quarter section corners by the original government survey can be ascertained, they are not to be moved, but will control all other surveys; but when the marks of the government survey have been obliterated, and the location of the corners by that survey can not be established by witnesses who know where they were located, resort must be had to other evidence, and, in the absence of any other proof, the measurements indicated by the field notes of the government survey must control. *Clark v. Thornburg*, Neb. (92 N. W. Rep. 1056).

POSSESSION.

EPITOME OF CASES.

Sec. 552. Possession as notice of rights or title. Possession taken by an obligee in a bond for title in pursuance thereof is notice of his rights. *Georgia State Bldg. & L. Ass'n v. Faison*, 114 Ga. 655 (40 S. E. Rep. 760). A married woman's exclusive possession of property, after separation from her husband, is notice of her rights therein. *Allen v. Moore*, 30 Colo. 307 (70 Pac. Rep. 682). Possession by a school district of a part of a tract of land claimed by it under an unrecorded deed, and the erection by it of a building thereon, is notice to a subsequent purchaser of its rights and title. *Kuhl v. Lightle*, 29 Wash. 137 (69 Pac. Rep. 630). Possession by a railroad company of a right of way over which it has constructed its road is notice of its rights under a parol contract by virtue of which it claims such way. *Grafton Dolomite Stone Co. v. St. Louis, C. & St. P. Ry. Co.*, 199 Ill. 458 (65 N. E. Rep. 424). A railroad company which enters upon a right of way, clears the same and commences the work of grading and constructing bridges, has such possession thereof as is notice to all subsequent purchasers of its rights in the premises. *Illinois Southern Ry. Co. v. Borders*, 201 Ill. 459 (66 N. E. Rep. 382).

Sec. 553. Possession by tenant or tenant in common as notice. A tenant's possession of the leased premises after the expiration of his term is not only notice of all his rights and equities growing out of the original agreement, but also of such additional or different rights and equities as he has acquired under subsequent agreements with his landlord. *Allen v. Gates*, 73 Vt. 222 (50 Atl. Rep. 1092). A tenant in common relying upon his tenant's possession of land to give notice of his claim of exclusive ownership of a part thereof, to a purchaser of his cotenant's undivided interest, can not claim any greater rights against such purchaser than are shown by the record

of his title. *Storthz v. Chapline*, Ark. (70 S. W. Rep. 465). Where land is purchased by two persons, each paying one-half of the purchase price, under an agreement that it is to belong to them as tenants in common in the same proportion, and title is taken in the name of one who agrees to convey an undivided one-half to the wife of the other, the exclusive possession of the whole of the land by the latter is notice of his rights to one taking a conveyance from the other. *Kirkman v. Moore*, 30 Ind. App. 549 (65 N. E. Rep. 1042).

POWER OF ATTORNEY.

EPITOME OF CASES.

I

Sec. 554. Authority conferred by power of attorney.

A power to sell includes the power to execute the conveyance necessary to complete the sale. *Hunter v. Eastham*, 95 Tex. 648 (69 S. W. Rep. 66). A wife to whom her husband has given a power of attorney to sell and convey his real estate is not authorized to convey it to her son in repayment of loans made by him to her in consideration of his agreement for her future support. *Lewis v. Lewis*, 203 Pa. St. 194 (52 Atl. Rep. 203). A power of attorney given by the owner of lands authorizing the attorney "to lay out lots in such form and fronting on such streets, lanes, and alleys or areas as, in his judgment, may be advisable," does not give him authority to petition a city council to vacate streets, especially where the owner in a previous conveyance of a small lot in the midst of the lands affected by the power reserved the right to represent the property in all proceedings looking to the vacation of the same streets; but the act of such a petition may be ratified by the owner so as to give it validity. *Daughters of American Revolution v. Schenley*, 204 Pa. St. 572 (54 Atl. Rep. 366); 204 Pa. St. 584 (54 Atl. Rep. 370). Where no power is given an agent to convey without consideration, or upon a consideration inuring to him, his attempt to do so is inoperative upon the title and passes nothing. *Hunter v. Eastham*, 95 Tex. 648 (69 S. W. Rep. 66). Citing, *Meade v. Brothers*, 28

Wis. 689; *Campbell v. Campbell*, 57 Wis. 288 (15 N. W. Rep. 138); *Dupont v. Wertheman*, 10 Cal. 368; *Randall v. Duff*, 79 Cal. 115 (19 Pac. Rep. 533); *Jeffery v. Hursh*, 49 Mich. 31 (12 N. W. Rep. 898); *Deputron v. Young*, 134 U. S. 241 (10 Sup. Ct. Rep. 539; 33 L. Ed. 923) *Mott v. Smith*, 16 Cal. 534.

Sec. 555. Execution of power—Form, force and effect of deed by attorney. A deed, executed by an attorney in fact, purporting to convey real estate with general warranty under a power of attorney authorizing only a quitclaim deed, has the effect to quitclaim on the part of the principal, although he is not bound by the warranty. *Robinson v. Lowe*, 50 W. Va. 75 (40 S. E. Rep. 454). Where A. B., the owner of certain real estate, gave a power of attorney to P. M. to sell and convey the same, a deed executed by P. M. to M., in the body of which the grantor was described as "P. M., attorney in fact for A. B.," and the same words were used in describing the grantor in the covenants and in the signing of the instrument, it was held that the deed was not the individual deed of P. M., but was a valid exercise of the power and passed title to M. as against a subsequent grantee of A. B. *Donovan v. Welch*, 11 N. Dak. 113 (90 N. W. Rep. 262). The court say: "Is the foregoing instrument the individual deed of Patrick McHugh, or is it the deed of Amelia Burritt? Plaintiff insists that it is the deed of McHugh, and not the deed of her grantor, Amelia Burritt; and, to sustain this contention, her counsel invoked a well settled rule applicable to the execution of sealed instruments by agents. which rule, as applied to conveyances of real estate, is that: 'If an attorney has authority to convey land, he must do it in the name of the principal. The conveyance must be the act of the principal, and not of the attorney, otherwise the conveyance is void. And it is not enough for the attorney, in the form of the conveyance, to describe that he does it as attorney; for, he being in the place of the principal, it must be the act and deed of the principal, done and executed by the attorney in his name.' *Fowler v. Shearer*, 7 Mass. 14; *Mechem*, Ag. § 419, and cases cited in note; 2 *Jones*, Real Prop. § 1040, and cases cited; *Elwell v. Shaw*, 16 Mass. 42 (8 Am. Dec. 126); *Echols v. Cheney*, 28 Cal. 157; *Stinchfield v. Little*, 1 Greenl. 231 (10 Am. Dec. 65); *Caddell v. Allen*, 99 N. C. 542 (6 S. E. Rep. 399); *Norris v. Dains*, 52 O. St. 215 (39 N. E. Rep. 660; 49 Am.

St. Rep. 716); *North v. Henneberry*, 44 Wis. 306; *Clarke's Lessee v. Courtney*, 5 Pet. 319, 350 (8 L. Ed. 140). Courts have uniformly held that: 'The proper form of executing a deed by attorney is by signing the name of the principal and adding "by _____, His Attorney," but we know of no case holding that this is the only form of execution which will make the deed the act of the principal. On the contrary, the cases are numerous in which deeds not so executed have been held sufficient. In *Wilks v. Back*, (K. B. 1802) 2 East, 142 (8 Eng. Ruling Cas. 634), the rule was laid down that: 'One who executes a deed for another under a power of attorney must execute it in the name of the principal; but, if that is done, it matters not in what form of words such execution is denoted by the signature of the name. Wilks, who had a power of attorney for James Browne, for the purpose of binding himself and also Browne, executed a bond in this form: "Mathias Wilks (L. S.) for James Browne, Mathias Wilks, (L. S.)"' It was urged that the signature ought to have been in the name of Browne, by Wilks, and that, inasmuch as it was signed by Wilks for Browne, it was not the bond of Browne. This contention was held to be unsound by a united court: Grose, J., saying: 'I concede to the doctrine in all the cases cited that an attorney must execute his power in the name of his principal, and not in his own name; but here it was so done, for where is the difference between signing "J. B., by M. W., His Attorney," which must be admitted to be good, and "M. W. for J. B."? In either case the act of sealing and delivering is done in the name of the principal, and by his authority. Whether the attorney put his name first or last can not affect the validity of the act done.' Lawrence, J., in concurring, said: 'There is no particular form of words required to be used, provided the act be done in the name of the principal.' And Le Blanc, J., stated: 'I can not see what difference it can make as to the order in which the names stand.' This case has been followed both in England and in this country with approval and without criticism. In *Mussey v. Scott*, 7 Cush. 215 (54 Am. Dec. 719), a written lease was thus executed: 'John Hammond for B. B. Mussey.' The court held that the lease was well executed in the name of Mussey, following *Wilks v. Back*, 2 East, 142 (8 Eng. Ruling Cas. 634), and, in referring to that decision, stated that it had never been overruled, but had always been re-

garded as rightly made. In *Martin v. Almond*, 25 Mo. 313, a deed signed as follows, 'G. H. [Seal], I. J. [Seal], Attorneys for A. B. and C. D.,' was held to be the deed of the principals, A. B. and C. D., following *Wilks v. Back*, 2 East, 142 (8 Eng. Ruling Cas. 634). In *Magill v. Hinsdale*, 6 Conn. 465 (16 Am. Dec. 70), it was held that a mortgage deed which was executed by M., the authorized agent of the Middletown Manufacturing Company, and recited that 'I, M., agent for the Middletown Manufacturing Company,' grant, etc., and was signed, 'M., Agent for the Middletown Manufacturing Company,' was the deed of the company, and not his individual deed. In that case the court said: 'No particular form of words is necessary for an agent to bind his principal, if he expresses in the instrument the capacity in which he acts. Deeds are to receive a construction from the whole taken together, and every deed ought to be so construed as to effect the intention of the parties. "Ut res magis valeat quam pereat." *Wilks v. Back*, 2 East, 142 (8 Eng. Ruling Cas. 634).' In *Wilburn v. Larkin*, 3 Blackf. 55, a bond signed as follows, 'For L. J. Larkin, George Crum [L. S.],' was held to be the bond of Larkin, although its execution would have been more formal had it been signed 'L. J. Larkin, by George Crum, His Attorney.' In *Hunter's Adm'rs v. Miller's Ex'rs*, 6 B. Mon. 612, a written contract signed, 'William S. Hunter, for [seal] Thomas Todd and Mary Hunter,' was held to be the contract of Thomas Todd and Mary Hunter. The following cases will be found in harmony with, and illustrative of, the rule of construction adopted in *Wilks v. Back*, 2 East, 142 (8 Eng. Ruling Cas. 634): *Jones' Devises v. Carter*, 4 Hen. & M. 196; *Robbins v. Austin*, 42 Hun, 469; *Webb v. Burke*, 5 B. Mon. 51; *Shanks v. Lancaster*, 5 Grat. 110 (50 Am. Dec. 108); *Page v. Wight*, 14 Allen, 182; *Distilling Co. v. Brant*, 69 Ill. 658 (18 Am. Rep. 631); *McClure v. Herring*, 70 Mo. 18 (35 Am. Rep. 404); *Hale v. Woods*, 10 N. H. 470 (34 Am. Dec. 176); *Butterfield v. Beall*, 3 Ind. 203."

Sec. 556. Effect of principal's ratification of invalid deed by attorney. A deed by an attorney in fact which is insufficient to convey title may be given validity by ratification by his principal, and ordinarily such a ratification relates back to the date of the deed; but this principle is subject to the exception that it will not be applied to defeat the intervening rights of third parties. Applying this exception, it is held that

if a party has a complete defense to an action at the time suit is brought, he can not be deprived thereof by a third party ratifying a deed which, at the commencement of the suit, was without binding force for want of such ratification. *Graham v. Williams*, 114 Ga. 716 (40 S. E. Rep. 790). The court say: "In the present case the plaintiff virtually admitted, by putting in evidence the deed of ratification, that his title was not sufficient, at the time suit was brought, to have sustained a recovery; for the deed of ratification states, in substance, that the power of attorney made by Eienstein to his agent was not broad enough to authorize the agent to convey the land. The defendants had the right, under the facts as they stood at the time suit was commenced, to have a nonsuit. They had the right to have the case tried upon the facts as they existed at the time of the commencement of the suit. The plaintiff had no right to interject what might be called a new party, Einstein, and a new title originating after the commencement of the suit. In the case of *Wittenbrock v. Bellmer*, 57 Cal. 12, it appeared that the president of a building and loan association had, without authority, transferred a note and mortgage to Wittenbrock, who commenced proceedings to foreclose the mortgage. After the action had been pending for several months, the trustees of the association ratified the previous action of its president in the premises. The court said: 'We are unable to discover any principle upon which the defendant's rights could be affected by such ratification. Conceding that at the date of the commencement of the action the plaintiff had no cause of action, it does not seem to us that he could maintain the action upon a cause of action subsequently acquired against the defendant. The case was at issue, and, if it had been tried at any time prior to the date of the ratification, the judgment must have been for the defendant. Could a stranger to the action step in at any time before the trial, and deprive the defendant of that right by placing in the hands of his adversary an instrument upon which he might have maintained an action, or one which he alleged that he had, but in fact did not have, when he commenced the action? Clearly not. If a party has no cause of action at the time of the institution of his action, he can not maintain it by filing a supplemental complaint founded upon matters which have subsequently occurred.' Similar rulings were made by the same court in *Taylor v. Robinson*, 14 Cal. 396, and *McCracken v. City of San Francisco*, 16 Cal. 624. In 61 Am. Dec. 88, Mr. Freeman, in

his notes to *Persons v. McKibben*, 5 Ind. 261, in which the ruling was contrary to that made in *Wittenbrock v. Bellmer*, 57 Cal. 12, cites the latter case, and says that 'the ruling of the California case * * * is the better decision.' The same view of the law is taken by the supreme court of the United States in *Parmelee v. Simpson*, 5 Wall. 86 (18 L. Ed. 542), and in *Cook v. Tullis*, 18 Wall. 338 (21 L. Ed. 933). In the latter case *Wittenbrock v. Bellmer*, 57 Cal. 12, is cited with approval. In the notes to *Atlee v. Bartholomew*, 5 Am. St. Rep. 103, 114 (69 Wis. 43; 33 N. W. Rep. 110), it was said: 'As a general rule, if a party has a complete cause of action or defense when a suit is commenced, he can not be deprived thereof, *pendente lite*, by his adversary, or some other party, ratifying some act or contract which at the commencement of the action was without any binding force for want of such ratification.' See, also, *Pollock v. Cohen*, 32 O. St. 514; *Fiske v. Holmes*, 41 Me. 441; *Wood v. McCain*, 7 Ala. 806 (42 Am. Dec. 612)."

PUBLIC LANDS.

EPITOME OF CASES.

Sec. 557. Indians and public lands. Tribal Indians, living on their reservation, may maintain an action in the state courts to recover possession of an undivided interest in land lying outside of any Indian reservation and in possession of citizens of the state. *Bem-Way-Bin-Ness v. Eshelby*, 87 Minn. 108 (91 N. W. Rep. 291). Citing, *Selkirk v. Stephens*, 72 Minn. 335 (75 N. W. Rep. 386; 40 L. R. A. 759); *Swartzel v. Rogers*, 3 Kan. 374; *Wiley v. Keokuk*, 6 Kan. 94; *Ingraham v. Ward*, 56 Kan. 550 (44 Pac. Rep. 14); *Whirlwind v. Von der Ahe*, 67 Mo. App. 628; *Felix v. Patrick*, (C. C.) 36 Fed. Rep. 457; *Y-ta-tah-wah v. Rebock*, (C. C.) 105 Fed. Rep. 257; *Felix v. Patrick*, 145 U. S. 317 (12 Sup. Ct. Rep. 862; 36 L. Ed. 719). As to mortgage of Cherokee lands by a Cherokee Indian, and jurisdiction of federal court to foreclose, see *Crowell v. Young*, Ind. Ter. (69 S. W. Rep. 829); power of Indian to will allotted lands, *United States v. Zane*, Ind. Ter. (69 S.

W. Rep. 842) ; action to recover possession by tribe or member thereof, *Daniels v. Miller*, Ind. Ter. (69 S. W. Rep. 925) ; *Brought v. Cherokee Nation*, Ind. Ter. (69 S. W. Rep. 937) ; title and rights of a Mississippi Choctaw not on the rolls of the Choctaw Nation, *Ikark v. Minter*, Ind. Ter. (69 S. W. Rep. 852). Act Cong., Mar. 3, 1875 (18 Stat. 420) ; Act Cong., July 4, 1884 (23 Stat. 97) ; Act Cong., Feb. 8, 1887 (24 Stat. 390), construed and applied—homestead rights of Indians in public lands. *Frazee v. Spokane County*, 29 Wash. 278 (69 Pac. Rep. 779). Act Cong., May 2, 1890, § 31 (Ind. Ter. Ann. Stat., § 31) construed and applied—proceedings to subject improvements on Indian lands to sale. *Hampton v. Mays*, Ind. Ter. (69 S. W. Rep. 1115). Act Cong., June 28, 1898 construed and applied—ratification of “Atoka agreement”—construction and effect. *Ansley v. Ainsworth*, Ind. Ter. (69 S. W. Rep. 884).

Sec. 558. Conclusiveness of decisions of land department. The final decision of the department officers of the land department of the general government in a contest case involving the right of the parties thereto to a portion of the public domain is final and conclusive, and is not open to collateral attack, and can not be re-examined, except in a proper, direct proceeding, instituted against the successful party. *Missouri, K. & T. Ry. Co. v. Pratt*, 64 Kan. 118 (67 Pac. Rep. 464). In discussing this subject, the supreme court of California, in the case of *Gage v. Gunther*, 136 Cal. 338 (68 Pac. Rep. 710; 89 Am. St. Rep. 141), say: “The land department of the United States has been created as the tribunal for determining the right under the laws of the United States of any person to receive a patent for any of the public lands, and that tribunal is vested with jurisdiction to determine all questions of fact that may arise in any controversy respecting such right. As a necessary result therefrom, the determination by this tribunal of any question of fact is conclusive upon all other tribunals, wherever such question may be presented. The character of the land, whether it is subject to entry under the laws invoked therefor, the qualifications of the entryman, the extent of the improvement or reclamation made by him, whether such improvement is a sufficient compliance with the statutory provisions for entitling him to a patent, or whether it has been made within the time prescribed by statute, or, if not, whether the reasons offered by him are sufficient to condone such failure,

or any default on his part, whether he has been guilty of laches, or exercised sufficient diligence,—are all questions of fact, to be submitted to and determined by the land department, and the issuance of a patent for the land is a final determination by that tribunal of the existence of all facts depending upon testimony which are necessary to entitle him to the patent, and, in the absence of fraud, mistake, or imposition, such facts are not subject to a re-examination in any other tribunal. If, however, in making such determinations of fact, that tribunal has disregarded the law applicable thereto, or has erred in its construction of the law, or by reason of mistake has issued to one person a patent for the land, which, upon undisputed facts, should have been issued to another, who has contested his claim, and has shown himself entitled to the patent, the person in whose favor the patent was issued will be held to hold the land for the benefit of the one to whom it should have issued. Proceedings for this purpose are, however, to be taken in a court of equity, and are to be governed by the rules of equity procedure."

An adjudication of the land department rejecting an application for a patent to a placer mining claim is not conclusive that the ground is not placer ground so as to bar an action by the placer locator against a subsequent locator of a lode claim, where the rejection was not placed on that ground. *Clipper Min. Co. v. Eli Min. & Land Co.*, 29 Colo. 377 (68 Pac. Rep. 286; 93 Am. St. Rep. 89). U. S. Rev. Stat., §§ 441, 453, 2450, 2457 construed and applied—decision of secretary of interior—review by successor—board of equitable adjudication in land cases. *Gage v. Gunther*, 136 Cal. 338 (68 Pac. Rep. 710; 89 Am. St. Rep. 141).

Sec. 559. Jurisdiction of state courts. The law, in the absence of some specific provision to the contrary, commits, in the first instance, all matters affecting the disposition of public lands of the United States, and the adjustment of all private claims thereto, and grants therefor under congressional legislation, to the general land office, under the supervision of the secretary of the interior; and while such matters are pending and undetermined in such department the courts have no jurisdiction thereof. *St. Paul, M. & M. Ry. Co. v. Olson*, 87 Minn. 117 (91 N. W. Rep. 294; 94 Am. St. Rep. 693). The courts will not assume jurisdiction in disputes over title to the United States government lands, where it appears that title is still pending and undetermined in the government land department. But, where the action is based upon the right of possession only,

such rule does not apply. *Mathews v. O'Brien*, 84 Minn. 505 (88 N. W. Rep. 12) ; *Laramie Nat. Bank v. Steinhoff*, Wyo. (71 Pac. Rep. 992). Where adverse claimants of public land are residing thereon pending a decision of their claims by the land department, upon a final decision confirming the title of one of them, he may maintain an action of forcible entry and detainer against the unsuccessful claimant to obtain possession, upon his refusal to surrender upon being given the statutory notice to quit. *Cope v. Braden*, 11 Okla. 291 (67 Pac. Rep. 475) ; *Hebeisen v. Hatchell*, 12 Okla. 29 (69 Pac. Rep. 888) ; *McQuiston v. Watton*, 12 Okla. 130 (69 Pac. Rep. 1048) ; *Brown v. Hartshorn*, 12 Okla. 121 (69 Pac. Rep. 1049) ; *Burns v. Noell*, 12 Okla. 133 (69 Pac. Rep. 1076) ; *Steele v. Noell*, 12 Okla. 137 (69 Pac. Rep. 1077). One applying to the state land office to purchase land to which the state has no title does not, by the payment of the proper application fee and receiving a certificate of such payment from the surveyor general of the state, thereby acquire a right to have an injunction against persons mining upon the land pending proceedings in the United States land department to determine whether the land is agricultural or mineral in character. *Allen v. Pedro*, 136 Cal. 1 (68 Pac. Rep. 99).

Sec. 560. School lands. Act Cong., Mar. 2, 1853 (10 Stat. 172), § 20; Act Cong., Feb. 22, 1889 (25 Stat. 676), § 10, construed and applied—grant of school lands to state of Washington. *State v. Johanson*, 26 Wash. 668 (67 Pac. Rep. 401). Act Cong., Feb. 22, 1889 (25 Stat. 676), §§ 10, 11, 17; Wash. Laws 1895, p. 55, ch. 34, construed and applied—sale of school lands—use of proceeds. *State v. Maynard*, 31 Wash. 132 (71 Pac. Rep. 775). The title of one claiming as grantee of a county lands previously granted to it by the legislature of the state of Texas for school purposes, is not affected by the United States supreme court subsequently deciding that such county was not and never had been a part of Texas. *Cameron's Ex'rs v. State*, 95 Tex. 545 (68 S. W. Rep. 508). Ark. Laws 1881, p. 154 construed and applied—proceedings for sale of school lands. *Griffith v. Richards*, 64 Kan. 257 (67 Pac. Rep. 846). Kan. Gen. Stat. 1901, § 6354 construed and applied—liability of purchased school lands for taxes, and sale therefor—patent to purchaser—title and rights between him and holder of school land certificate. *Griffith v. Richards*, 64 Kan. 257 (67 Pac. Rep. 846). Tex. Const. 1876, art. 7, § 6 does not authorize

county commissioners to convey school lands to a surveyor in payment for his services in subdividing such lands for sale. *Dallas County v. Club Land & Cattle Co.*, 95 Tex. 200 (66 S. W. Rep. 294). Tex. Rev. Stat., art. 4269 construed and applied—survey of school lands—title and boundaries of land acquired by county. *Steward v. Coleman County*, 95 Tex. 445 (67 S. W. Rep. 1016). Tex. Rev. Stat., art. 4218j construed and applied—proof of purchaser's occupancy of land—conclusiveness of commissioner's certificate of occupancy. *Logan v. Curry*, 95 Tex. 664 (69 S. W. Rep. 129). Tex. Laws 1901, p. 292, §§ 3, 9 construed and applied—forfeiture by failure of purchaser to reside on land. *Bates v. Bratton*, 96 Tex. 279 (72 S. W. Rep. 157). Tex. Laws 1895, p. 66; Sayles' Ann. Tex. Stat., art. 4218k, construed and applied—sale of school lands by actual settler—requirements of vendee. *Hartman v. Crawford*, 95 Tex. 193 (66 S. W. Rep. 206); *Spence v. Dawson*, 96 Tex. 43 (70 S. W. Rep. 73). 2 Batt's Ann. Tex. Civ. Stat., art. 4218ff, 4218fff construed and applied—purchase of additional lands by owner or occupant of school lands—residence required—effect of void sale to another. *Roberson v. Sterrett*, 96 Tex. 180 (71 S. W. Rep. 385; 73 S. W. Rep. 2). Tex. Laws, 1901, pp. 294-296, §§ 3-6; Rev. Stat., art. 4218f, as amended by Laws 1897, p. 184, construed and applied—sale of school lands—prior right of lessee to purchase—rights of assignee. *Hazlewood v. Rogan*, 95 Tex. 295 (67 S. W. Rep. 80). For construction of Act. 1901 in connection with Tex. Laws 1887, p. 83; Laws 1895, p. 63; Laws 1897, p. 184, and Const., art. 7, § 4, see *Ketner v. Rogan*, 95 Tex. 559 (68 S. W. Rep. 774). For particular cases as to purchase by lessee of school lands or his assignee, see *Carothers v. Rogan*, 96 Tex. 113 (70 S. W. Rep. 18); *McGee v. Corbin*, 96 Tex. 35 (70 S. W. Rep. 79). Tex. Rev. Stat. 1895, art. 4218L construed and applied—forfeiture by purchaser's failure to pay interest. *Bates v. Bratton*, 96 Tex. 279 (72 S. W. Rep. 157); *Harper v. Terrell*, 96 Tex. 479 (73 S. W. Rep. 949). For construction of Tex. Act. 1899, validating purchases of school lands, see *Spence v. Dawson*, 96 Tex. 43 (70 S. W. Rep. 73); *Bates v. Bratton*, 96 Tex. 279 (72 S. W. Rep. 157). Power of land commissioner in Texas to cancel lease of school lands. *Blevins v. Terrell*, 96 Tex. 411 (73 S. W. Rep. 515). Wash. Laws 1893, pp. 297, 386; Laws 1895, p. 527; Laws 1897, p. 229, construed and applied—power of board of regents and land commissioners as to sale of "old university site." *Callvert v. Winsor*, 26 Wash. 368 (67 Pac. Rep.

91). The power conferred upon the board of appraisers by Wash. Laws 1897, p. 227, § 15 to order a new sale of school lands is discretionary. *State v. Bridges*, 30 Wash. 268 (70 Pac. Rep. 506). Wyo. Pub. Stat., § 13, as amended by Laws 1901, p. 75, ch. 71; Rev. Stat., § 815, construed and applied—lease of school lands—preference of citizens—renewal of lease—power of land commissioners. *Cooper v. McCormick*, 10 Wyo. 379 (69 Pac. Rep. 301).

Sec. 561. Definition of "lead," "lode" or "vein" of mineral matter. In discussing what constitutes a "lead," "lode," or "vein" of mineral matter, the supreme court of Arkansas, in the case of *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525 (69 S. W. Rep. 572; 91 Am. St. Rep. 87), say: "It is difficult to define what is meant by a 'lead,' 'lode,' or 'vein' of mineral matter. The first reported case in which a definition was attempted is the *Eureka Case*, 4 Sawy. 302, 311 (Fed. Cas. No. 4548). The court, after observing that word was not always used in the same sense in scientific works on geology and mineralogy, and by those actually engaged in the working of mines, said: 'It is difficult to give any definition of the term as understood and used in the acts of congress which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode, in the judgment of geologists. But to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for, and reasonably expect to find, the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface, and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term, as used in the acts of congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rocks.' The supreme court of the United States, in *Mining Co. v. Cheesman*, 116 U. S. 529, 534 (6 Sup. Ct. Rep. 481, 483; 29 L. Ed. 712), followed this citation by observing: 'This definition has received repeated commendation in other cases,—especially in *Stevens v. Williams*, 1 McCrary, 480, 488 (Fed. Cas. No. 13,413), where a shorter definition by Judge Hallett, of the Colorado circuit court, is also approved, to wit: 'In general it may be said that a lode or vein is a body of mineral, or mineral body of

rock, within defined boundaries, in the general mass of the mountain.' And the same court in the same case said: 'The lode or vein must be continuous in the sense that it can be traced through the surrounding rocks, though slight interruptions of the mineral-bearing rock would not be alone sufficient to destroy the identity of the vein. Nor would a short, partial closure of the fissure have that effect, if a little farther on it recurred again, with mineral-bearing rock within it.' *Mining Co. v. Cheesman*, 116 U. S. 538 (6 Sup. Ct. Rep. 485; 29 L. Ed. 712)."

Sec. 562. Mining claims—Location and relocation. In the absence of intervening rights, the fact that mineral is not discovered on a claim until after the notice of location is posted, and the boundary marked is material, and, where the discovery is the result of work subsequently done by the locator, his possessory rights under the location are complete from the date of such discovery. *Cedar Canyon Consol. Min. Co. v. Yarwood*, 27 Wash. 271 (67 Pac. Rep. 749; 91 Am. St. Rep. 841). Where a locator discovering that his locaton is excessive, upon his attempt to sell the same, procures a third party to make a new location of a part thereof, he thereby admits the excessiveness of his original location, so as to authorize a claim of the excess by a subsequent locator, the location by the third party having proven to be void. *Gohres v. Illinois & J. Gravel Min. Co.*, 40 Or. 516 (67 Pac. Rep. 666). One may not go upon a prior valid placer location to prospect for unknown lodes, and get title to lode claims thereafter discovered and located in this manner and within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or by his conduct is estopped to complain of it. Before it can be said that a lode is known to exist, there must be actual knowledge, as distinguished from supposition or surmise. *Clipper Min. Co. v. Eli Min. & Land Co.*, 29 Colo. 377 (68 Pac. Rep. 286; 93 Am. St. Rep. 89). Holding and developing a mining claim under an adverse claim thereto for the prescriptive period gives the claimant a valid claim against every one except the United States. *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525 (69 S. W. Rep. 572; 91 Am. St. Rep. 87). An abandonment of a valid location is not effected by a subsequent invalid attempted relocation, and work done after both of such locations will be attributed to the valid location. *Temescal Oil Min. & Development Co. v. Salcido*, 137 Cal. 211 (69 Pac. Rep. 1010).

The mere cancellation of an entry of a mining location does not render the ground open to relocation. Where, in pursuance of an agreement between them, a locator, by amendment, includes in his description a strip of land excluded by a prior locator from his application for a patent, and a final certificate of purchase is issued by the land department to him which describes such strip, a change of the records by the land commissioner and issue of patent to him excluding such strip, without notice to him, is void and does not destroy his vested right to a patent to such strip as against a third party subsequently locating the same. *Rebecca Gold Min. Co. v. Bryant*, 31 Colo. 119 (71 Pac. Rep. 1110).

Sec. 563. Mining claims—Marking boundaries—Notice of location—Description. In New Mexico a preliminary or discovery notice of location of a mining claim is unknown, and a locator, as against a subsequent locator who enters peaceably, must post such a notice as, when a copy thereof is recorded, the record will meet the requirements of U. S. Rev. Stat., § 2324. *Deeney v. Mineral Creek Min. Co.*, N. Mex. (67 Pac. Rep. 724). The location of a mining claim is not affected by the failure to record the notice within thirty days, where it is recorded before any adverse rights to the same ground are acquired and no damage results from the delay. *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525 (69 S. W. Rep. 572; 91 Am. St. Rep. 87). Construing and applying U. S. Rev. Stat., § 2324 in connection with Hill's Ann. Or. Laws, § 3831, it is held that mining claims in an unorganized mining district are not required to be recorded. *Payton v. Burns*, 41 Or. 430 (69 Pac. Rep. 134). U. S. Rev. Stat., § 2324; *Ida. Rev. Stat.*, § 3102, construed and applied—requisites of description of mining claim in location notice. *Morrison v. Regan*, *Ida.* (67 Pac. Rep. 955). *Mont. Pol. Code*, § 3611 construed and applied—declaratory statement of locator of mining claim—sufficiency of description of corners. *Walker v. Pennington*, 27 Mont. 369 (71 Pac. Rep. 156). U. S. Rev. Stat., § 2324 applied—particular notice held sufficient. *Temescal Oil Min. & Development Co. v. Salcido*, 137 Cal. 211 (69 Pac. Rep. 1010); *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525 (69 S. W. Rep. 572; 91 Am. St. Rep. 87).

Sec. 564. Mining claims—Following "dip" of vein. Construing and applying U. S. Rev. Stat., § 2322 (U. S. Comp.

Stat., p. 1425) it is held that one having title to and possession of the surface containing apices of veins extending beneath the surface astride the vertical lines of such surface locations into lands the surface of which is owned by another, will be deemed to be the owner and in possession of all parts of such veins, notwithstanding the presumption in favor of such other owner's title to everything beneath the surface, and he may assert his right thereto without first establishing it at law. *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 27 Mont. 536 (71 Pac. Rep. 1005). The court say: "It is true that the defendant was and is in possession of the surface of the Pennsylvania claim. From this fact the presumption arose that it had title to and possession of everything beneath the surface. The doctrine, 'Cujus est solum, ejus est ad inferos,' applies, but not in the same sense as it does in other species of real estate. At common law this presumption was conclusive where there was no reservation in the grant, or where it did not operate by reason of some local custom. Under the mining laws of the United States, however, it is not conclusive, except as against one who cannot show that he enters beneath the surface in pursuit of a vein of which he owns the apex or portion thereof so intercepted by the end lines of his claim that he is entitled to follow it. When this appears, the presumption arising from the *cujus solum* doctrine is overturned, and gives way to the presumption based upon the provisions of § 2322, of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1425), which clothes the owner of the surface and the apex with the exclusive right to the possession and enjoyment both of such surface and the vein, including the right to follow it to its utmost depth. So, also the owner in possession of the surface and apex of the vein must be deemed to be in possession of all parts of the vein to which he has title, though it departs beyond his side lines, just as he is in possession of that portion of the earth vertically beneath his surface. Therefore, when he has followed it beneath the surface of his neighbor, he has committed no wrong, and is not a trespasser. On the contrary, the objecting neighbor is setting up a claim for which there is no foundation, and to foreclose which the provision of the statute may be invoked. It would be intolerable, were the owner of the apex of a vein which departs beneath his neighbor's surface compelled to resort to an action at law in every case in which the owner of such surface has trespassed upon

a portion of the vein; basing his right to enter thereon upon his surface ownership, merely. This view would involve a trial of the issue of ownership upon every assertion of title by the owner of the surface, and the actual owner of the vein would be compelled to establish his right to every foot on its descent into the earth."

Sec. 565. Mining claims—Doing required amount of work—Forfeiture and relocation. A forfeiture of a mining claim by a failure of the former owner to perform the annual labor required by law cannot be established, except by clear and convincing evidence. The burden of proving it rests upon him who sets it up. *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525 (69 S. W. Rep. 572; 91 Am. St. Rep. 87). See, on this subject, *Little Dorrit Gold Min. Co. v. Arapahoe Gold Min. Co.*, 30 Colo. 431 (71 Pac. Rep. 389). A notice of forfeiture of the interest of a co-owner of mining claims, because of failure to contribute his proportion of the expenditures, is fatally defective, if it does not specify the amount of money spent upon each claim, nor facts which might excuse expenditure on each claim. *Haynes v. Briscoe*, 29 Colo. 137 (67 Pac. Rep. 156). Where one who has failed for several years to do the annual work, required by U. S. Rev. Stat., § 2324, does the work of the amount required in a certain year, he will be treated as having "resumed work on the claim" within the meaning of the statute so as to prevent relocation by another. *Temescal Oil Min. & Development Co. v. Salcido*, 137 Cal. 211 (69 Pac. Rep. 1010). To the same effect, see *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525 (69 S. W. Rep. 572; 91 Am. St. Rep. 87). Wages paid a man hired to live in a house on a mining claim cannot be included to make up the \$100 worth of work each year required by the statute. *Hough v. Hunt*, 138 Cal. 142 (70 Pac. Rep. 1059; 94 Am. St. Rep. 17).

Sec. 566. Mining claims—Conflicting location—Adversary proceedings. A receiver's receipt issued to a mining applicant during the pendency in court of an action brought in support of an adverse claim, under U. S. Rev. Stat., § 2326, is void. *Deeney v. Mineral Creek Min. Co.*, N. Mex. (67 Pac. Rep. 724). *Ida Laws* 1899, p. 70, rendering it unnecessary to allege the citizenship of the plaintiff, does not apply to an action on an adverse claim, under U. S. Rev. Stat., 2326, after application has been made for

a patent. *Buckley v. Fox*, Ida. (67 Pac. Rep. 659). U. S. Stat., § 2326 (U. S. Comp. Stat. 1901, p. 1430); Act Cong., Mar. 3, 1881 (U. S. Comp. Stat. 1901, p. 1431); *Mills' Ann. Colo. Stat.*, § 188a, construed and applied—action to determine adverse claims—jury trial and view of premises by jury. *Connolly v. Hughes*, Colo. App. (71 Pac. Rep. 681). Neither party is entitled, as a matter of right, to a jury trial in an action brought under Mont. Code Civ. Proc., § 1310, to quiet title to mining property. *Montana Ore Purchasing Co. v. Boston & M. Consol Copper & Silver Min. Co.*, 27 Mont. 536 (71 Pac. Rep. 1005). See former opinion in this case 27 Mont. 228 (70 Pac. Rep. 1114), for exhaustive construction of this statute. Mont. Code Civ. Proc., § 1317 construed and applied—proceedings to compel inspection and survey to determine conflicting mining claims—title and interest required to be in petitioner—pleading and practice. *State v. District Court*, 26 Mont. 433 (68 Pac. Rep. 797). Mont. Code Civ. Proc., § 1314 construed and applied—order of inspection pending action to determine conflicting mining claims. *State v. District Court*, 26 Mont. 416 (68 Pac. Rep. 794); *State v. District Court*, Mont. (68 Pac. Rep. 861). For case determining particular questions as to pleading, practice, and evidence in action by locator of mining claim to quiet title, see *Shattuck v. Costello*, Ariz. (68 Pac. Rep. 529).

Sec. 567. Mining claims—Cotenants. The purchase by a joint tenant of a mining claim of a controlling interest in an adjacent mining claim, made for the express purpose of protecting his interest in the former claim inures to the benefit of his cotenants, and he cannot avoid this result by impeaching their common title to such claim. *Cedar Canyon Consol. Min. Co., v. Yarwood*, 27 Wash. 271 (67 Pac. Rep. 749; 91 Am. St. Rep. 841, see pp. 851-889 for exhaustive collation of authorities on "Cotenants in mines"). For a discussion of the relative rights of cotenants of mining claims, see *Yarwood v. Johnson*, 29 Wash. 643 (70 Pac. Rep. 123). The omission of the name of one of several co-owners of a mining claim from an application for a patent becomes harmless, where, before final action by the government, he transfers his interest to a cotenant who is named in the application. *Wetzstein v. Largey*, 27 Mont. 212 (70 Pac. Rep. 717). For a discussion

of the principles governing mining partnerships, see *Hartney v. Gosling*, 10 Wyo. 346 (68 Pac. Rep. 1118).

Sec. 568. Mining claims—Removal of timber—Injunction against removal of ores. Act Cong., July 3, 1878 (20 Stat. 88; 1 Supp. Rev. Stat. 166; U. S. Comp. Stat. 1901, p. 1582), authorizing the removal of timber from public mineral lands for mining purposes, under regulations prescribed by the secretary of the interior, does not empower him to enlarge or restrict the purposes for which such timber may be used; and the taking of timber for the purpose of "roasting" ores preparatory to smelting is a taking for a "mining" purpose. *United States v. United Verde Copper Co.*, Ariz. (71 Pac. Rep. 954). Where an injunction is sought against defendants engaged in removing ores from beneath the surface of the plaintiff's ground, the burden is upon them to show that they are not trespassers, and that they have a title which justifies their intrusion; and, in case of doubt, the injunction should be granted. See opinion as to evidence admissible and required in such an action. *Anaconda Copper Min. Co. v. Heinze*, 27 Mont. 161 (69 Pac. Rep. 909). For particular fact cases as to the right to an injunction to protect mining rights, see *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 27 Mont. 410 (71 Pac. Rep. 403); *Harley v. Montana Ore Purchasing Co.*, 27 Mont. 388 (71 Pac. Rep. 407); *Maloney v. King*, Mont. (71 Pac. Rep. 469).

Sec. 569. Title to mining claim conferred by government certificate of purchase—Tender of deed by vendor of claim holding such certificate. A vendee of a mining claim placed in possession thereof cannot refuse a deed to the claim tendered by his vendor who has duly entered the claim, paid therefor and obtained a certificate of purchase from the government, and claim a rescission of his contract of purchase, merely because his vendor has not received his patent for the claim. *Dunbar, J.*, dissenting. *Bash v. Cascade Min. Co.*, 29 Wash. 50 (69 Pac. Rep. 402). The court say: "In *Carroll v. Safford*, 3 How. 441 (11 L. Ed. 671), it was held that after the price of the government land had been paid, and the purchaser held the receiver's certificate therefor, the land was subject to taxation, although the patent was not then issued. The court there said: 'Lands which have been sold by the United States can in no sense be called the property of the United

States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are concerned, they are protected under the patent-certificate as fully as under the patent. * * * The government, until the patent shall issue, holds the mere legal title for the land, in trust for the purchaser.' *Witherspoon v. Duncan*, 4 Wall. 210 (18 L. Ed. 339); *French v. Spencer*, 21 How. 228 (16 L. Ed. 97); *Stark v. Starr*, 6 Wall. 402 (18 L. Ed. 925); *Wirth v. Branson*, 98 U. S. 118 (25 L. Ed. 86); *Simmons v. Wagner*, 101 U. S. 260 (25 L. Ed. 910); *Deffeback v. Hawke*, 115 U. S. 392 (6 Sup. Ct. Rep. 95; 29 L. Ed. 423); *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U. S. 428 (12 Sup. Ct. Rep. 877; 36 L. Ed. 762). In *Stark v. Starr*, 6 Wall. 402 (18 L. Ed. 925), it was said: 'The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued.' In *Deffeback v. Hawke*, 115 U. S. 392 (6 Sup. Ct. Rep. 95; 29 L. Ed. 423), the court held that the same rule applied to mineral lands as applied to cash and donation entries of agricultural lands; and in *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U. S. 428 (12 Sup. Ct. Rep. 877; 36 L. Ed. 762), where a receiver's receipt had been issued for mineral lands, the court, after reviewing the decisions of the secretary of the interior and the cases above cited, said: 'There is no conflict in the rulings of this court upon the question. With one voice they affirm that, when the right to a patent exists, the full equitable title has passed to the purchaser, with all the benefits, immunities, and burdens of ownership, and that no third party can acquire from the government interests as against him.' It follows that the *Cascade Mining Company*, at the time it purchased the property from the United States and paid therefor, and received the proper receiver's certificates was the fee simple owner of the estate. These certificates stood in the place of the patents, and could be set aside only for the same reason, and in the same way, and in the same forum, that patents could be set aside. *Wilson v. Fine* (C. C.) 40 Fed. Rep. 52 (5 L. R. A. 141); *Cornelius v. Kessel*, 128 U. S. 456 (9 Sup. Ct. Rep. 122; 32 L. Ed. 482). That the patents were not issued at once was because of the magnitude of business in the land department. But such delay in the mere administration of the affairs of the land department does not lessen the title of the purchaser in the lands purchased. The estate was vested

upon the issuance of the certificates of purchase, and a deed would convey the fee as well before patent issued as after. There was no claim that there were any defects in the title of the property; no pretense of any liens or incumbrances. The purchaser was in possession. We are, therefore, of the opinion that the respondent was not justified in refusing to take the deed when offered, and that he could not rescind the contract and recover back the money paid." In an opinion denying a rehearing in this case, [*Bash v. Cascade Min. Co.*, 29 Wash. 50 (70 Pac. Rep. 487)], the court adds: "The case turns on the contract to convey. This contract provides that upon the final payment the vendor shall convey the property described 'by good and sufficient deed in fee simple.' The meaning of this phrase, as intended by the parties, is the gist of the action. Ordinarily, when a person sells and agrees to convey lands to another by good and sufficient deed in fee simple, and when there are no circumstances to take the case out of the general rule, these words are held to mean a perfect title both legal and equitable. *Rawle, Cov.* (5th Ed.) §32; *Powell v. Conant*, 33 Mich. 396; *Moore v. Williams*, 115 N. Y. 586 (22 N. E. Rep. 233; 5 L. R. A. 654; 12 Am. St. Rep. 844); *Younie v. Walrod*, 104 Ia. 475 (73 N. W. Rep. 1021); *Easton v. Montgomery*, 90 Cal. 309 (27 Pac. Rep. 280; 25 Am. St. Rep. 123). But where, as in this case, the vendee has notice and knowledge of the condition of the title, knows that the title is perfect in the vendor with the exception of the issuance of the patent, goes into possession of the property, and makes improvements thereon, makes payments, asks for and is given an extension of time in which to make his final payment, and, when this extension has expired, asks for and offers a bonus of \$500 for further extension, when he knows patents have not issued, and that his time for payment has expired, such facts show clearly that the parties themselves not only intended that the contract to convey by good and sufficient deed in fee simple meant such title as the vendor could convey, and that the vendee was to rely upon the covenants contained in the deed to indemnify himself against loss by reason of the nonissuance of the patent, but also that the parties themselves so construed it by their subsequent acts and conduct. 1 *Warv. Vend.* § 24; *Godding v. Decker*, 3 Colo. App. 206 (32 Pac. Rep. 832); *Rader v. Neal*, 13 W. Va. 373; *Younie v. Walrod*, 104 Ia. 475 (73 N. W. Rep. 1021)".

Sec. 570 Swamp and tide lands. The federal swamp land act of 1850 vested in the state, as of the date the act took effect, the title of all lands determined by the general land department of the United States to be affected thereby. The decision of such land department on that question is conclusive except against persons claiming under a paramount title. Lands of the United States, at the date of the swamp land act of 1850, approved by the proper officers of the general land department as being lands of the character intended to be granted thereby, were, by such act and approval, segregated from the public domain and vested in the state, regardless of whether they were, at the date of such act, artificially covered with navigable water, by trespassers upon such domain. *Diana Shooting Club v. Lamoreaux*, 114 Wis. 44 (89 N. W. Rep. 880; 91 Am. St. Rep. 898). The official platting of lands by authority of the United States, indicating the character thereof as regards whether swamp or marsh lands or lands covered by the waters of a lake as the same appeared to the official surveyors at the time the original survey thereof was made, is prima facie evidence as to their then character in fact in an action involving the question of whether they were a part of the public domain and subject to sale to private parties. Mere flat, marshy lands along a river bank, submerged in many or most places by water on a level, substantially, with that of the river,—the stream, with its bed, banks and current, being well defined through the entire territory,—cannot be legitimately considered as having the physical characteristics of the bed of a lake or the legal characteristics thereof, especially where the lands were surveyed and sold as part of the government domain. *Illinois Steel Co. v. Budzisz*, 115 Wis. 68 (90 N. W. Rep. 1019). Act. Cong., Sept. 28, 1850 (9 Stat. 519), granting public swamp lands to the several states in which they were situated, for the purposes of reclamation, etc., constituted a grant of such lands to the states in præsenti, and did not require a formal conveyance to transfer the title to the states. *Simpson v. Stoddard County*, 173 Mo. 421 (73 S. W. Rep. 700). This rule does not extend to unsurveyed swamp lands. *Ogden v. Buckley*, 116 Ia. 352 (89 N. W. Rep. 1115); *Schlosser v. Hemphill*, 118 Ia. 452 (90 N. W. Rep. 842); *Small v. Lutz*, 41 Or. 570 (69 Pac. Rep. 825). A decision by the secretary of the interior that lands previously listed and certified by the government as swamp and overflowed lands to a state and conveyed by it to

another, are open to settlement under the homestead law, is conclusive upon the grantee of the state, the approval of the listing of it as swamp lands having been previously revoked. *Small v. Lutz*, 41 Or. 570 (69 Pac. Rep. 825). A purchaser from the state of lands covered by the waters of a lake, which it is impossible to use for the purpose of travel or commerce, or for pleasure, other than hunting, which lands the United States had surveyed, selected and by its patent conveyed to the state as swamp and overflowed lands, without meandering any of the waters thereon, is the absolute owner thereof, and the public have no right to fowl on the water thereon. *Barnard v. Thurston*, 86 Minn. 343 (90 N. W. Rep. 574). The state is not liable for the misconduct of the commissioner of public lands in failing to deliver a patent to a purchaser of tide lands entitled thereto, as required by the statute. *Billings v. State*, 27 Wash. 288 (67 Pac. Rep. 583). For exhaustive construction of numerous Missouri statutes concerning sale of swamp lands, see *Simpson v. Stoddard County*, 173 Mo. 421 (73 S. W. Rep. 700). Or. Laws 1891, p. 189; Laws 1899, pp. 57, 156, construed and applied—who may purchase tide lands from the state—restriction of right to citizens—title of purchaser. *State v. Carlson*, 40 Or. 565 (67 Pac. Rep. 516). Wash. Laws 1889-90, p. 470; Laws 1895, p. 128, construed and applied—plat of lands by boom companies—lease or purchase of state tide lands. *Samish Boom Co. v. Callvert*, 27 Wash. 611 (68 Pac. Rep. 367). Wash. Laws 1897, p. 229; Laws 1899, p. 138, construed and applied—appraisal of improvements on tide lands—manner of sale. *Sullivan v. Callvert*, 27 Wash. 600 (68 Pac. Rep. 363); *Samish Boom Co. v. Callvert* 27 Wash. 611 (68 Pac. Rep. 367). Wash. Laws 1899, p. 145 construed and applied—re-appraisement of tide lands—collection of interest in arrears. *Semon v. Calvert*, 27 Wash. 679 (68 Pac. Rep. 350).

Sec. 571. Town-site lands. Town-site trustees, appointed under Act. Cong., May 14, 1890, were officers or agents of the government, and the issuance of patent to them for a town site, and the recording of the same, did not operate to divest the department of the interior of all of the control of the land embraced therein. The conveyance of a town site to such trustees was for a particular use named by congress, and the courts had not, during their existence, the right to intercept the legal title in the hands of the government's agents; and

such trustees could not be adjudged by a court of equity to be trustees for the use and benefit of one claiming adversely to the trust created by the act of congress, under which patent was issued to them; and a petition which discloses on its face that the trustees had not, at the commencement of the action, conveyed the title by deed, but still retained the same, fails to state a cause of action for a resulting trust. *Fitzgerald v. Foster*, 11 Okla. 558 (69 Pac. Rep. 878). For construction of particular conveyance of lands in trust for town site, see *Gill v. Wallis*, N. Mex. (70 Pac. Rep. 575). For construction and application of numerous statutory provisions concerning town-site lands on which a prior mining claim is claimed, see *Callahan v. James*, Cal. (71 Pac. Rep. 104).

Sec. 572. Grants to railroads—Statutes construed. Where a railroad company claiming a right of way through public lands, under grant by act. Cong., Mar. 3, 1875 (18 Stat. 482), has filed its articles of incorporation and proofs of its organization as required, the actual construction of its road operates to definitely locate its right of way so as to give it good title thereto, as against a mining claim subsequently located, though the profile map had not been accepted because the land was unsurveyed. *Pennsylvania Min. & Imp. Co. v. Everett & M. C. Ry. Co.*, 29 Wash. 102 (69 Pac. Rep. 628). Act. Cong., June 3, 1856 (11 Stat. 17) construed and applied—grant of lands to Mobile & Georgia Railway Company. *Van Kirk Land & Const. Co. v. Green*, 132 Ala. 348 (31 So. Rep. 484). Act. Cong., May 12, 1864; Ia. Laws 20th Gen. Assem., ch. 28, construed and applied—grant of lands to Iowa in aid of railroad—taxation. *Chicago, M. & St. P. Ry. Co. v. Hemenway*, 117 Ia. 598 (91 N. W. Rep. 910). Act. Cong., Mar. 3, 1887 (24 Stat. 556) construed and applied—Sale by railroad company of lands granted to it—rights of purchaser when land is excepted from grant. *O'Connor v. Gertgens*, 85 Minn. 481 (89 N. W. Rep. 866); *Ramsay v. Tacoma Land Co.*, 31 Wash. 351 (71 Pac. Rep. 1024). For construction of numerous Texas statutes making railroad land grants, see *State v. Houston & T. C. Ry. Co.*, Tex. (68 S. W. Rep. 777).

Sec. 573. Preemption of public lands for homestead. A homestead entry valid upon its face constitutes such an appropriation and withdrawal of the land as to segregate it from

the public domain, and precludes it from subsequent homestead entry or settlement until the original entry is cancelled or declared forfeited, in which case the land reverts to the government as a part of the public domain, and becomes again subject to entry under the land laws of the United States. One who makes settlement on a tract of land while it is covered by the homestead entry of another is a mere intruder, a naked, unlawful trespasser; and no right, either in law or equity, can be founded thereon. *McMichael v. Murphy*, 12 Okla. 155 (70 Pac. Rep. 189); *Id.*, 12 Okla. 167 (70 Pac. Rep. 193); *Hodges v. Colcord*, 12 Okla. 313 (70 Pac. Rep. 383). One who has made an entry on government lands as a homestead and continued to reside with his wife thereon may bring an action for injury to the land, although he has not yet made final proof. *Wendel v. Spokane County*, 27 Wash. 121 (67 Pac. Rep. 576; 91 Am. St. Rep. 825). A person holding the duplicate final receipt of the receiver of the United States land office for land taken under the provisions of the homestead laws of the United States can maintain an action in the nature of ejectment for the possession of the land described in such final receipt. *McClung v. Penny*, 12 Okla. 303 (70 Pac. Rep. 404). Construing and applying Act Cong., Mar. 3, 1893, it is held that one who was within the Ponca Indian reservation before the hour of 12 o'clock noon (central standard time) of September 16, 1893, and made the race from said reservation into that part of the Cherokee Outlet which was opened to settlement on that day, is not by reason thereof disqualified from settling upon and filing a homestead entry upon a quarter section of land within the country then declared open to settlement. *Winebrenner v. Forney*, 11 Okla. 565 (69 Pac. Rep. 879); *McClung v. Penny*, 12 Okla. 303 (70 Pac. Rep. 404). Under U. S. Rev. Stat., § 2291, upon the death of an entryman, the homestead held under the laws of the United States descends to the widow, if there be one, and not to his heirs generally. *Cristy v. Cosby*, 11 Okla. 635 (69 Pac. Rep. 885). U. S. Rev. Stat., § 2269 construed and applied—effect of death of settler—application of statute to entry and purchase of Osage Trust and Diminished Reserve lands. *Ware v. Hitchcock*, 65 Kan. 328 (69 Pac. Rep. 355). The cancellation of a homestead entry because in conflict with selections under a railroad grant cannot be proven by a letter from the commissioner of the land office to the register of the land office. *Wilbur v. Cedar Rapids & M. R. Ry. Co.*, 116 Ia. 65 (89 N. W. Rep. 101).

Sec. 574. Exemption of timber culture claim from debts—Mortgage and sale of homestead claim. The provisions of 20 U. S. Stat. 114, § 4 that no land acquired under the tree culture act "shall in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of the final certificate therefor," is within the power of congress; and construing and applying this statute, it is held that where a member of a partnership who has perfected such claim contracted to convey it to the partnership upon his obtaining title from the United States, the subsequent enforcement of such agreement against him by judicial decree obtained by his deceased copartner's representatives, does not affect the exemption of his half interest, under the statute, from both his individual and the firm debts contracted prior to the issuance of the final certificate. *Adams v. Church*, 42 Or. 270 (70 Pac. Rep. 1037; 59 L. R. A. 782; 95 Am. St. Rep. 740). U. S. Rev. Stat., § 2296, relieving a government homestead claim from liability for the debts of the claimant contracted prior to the issuance of a patent, does not prohibit his mortgaging it as security for debt before issuance of a patent. *Klemp v. Northrop*, 137 Cal. 414 (70 Pac. Rep. 284). A contract to sell a homestead entry made by the entryman after final proof by him is not a violation of the statute prohibiting the entry of lands by one person for the benefit of another. *Doll v. Stewart* 30 Colo. 320 (70 Pac. Rep. 326).

Sec. 575. Patents. The commissioner of land office cannot cancel a patent regularly issued by the United States to the assignee of a military bounty land warrant, seven years after its issue and without any notice to the parties interested. *Long v. Olson*, 115 Ia. 388 (88 N. W. Rep. 933). In Kentucky a patent to lands already embraced in a previous patent is void. *Crate v. Strong*, (Ky.) 69 S. W. Rep. 957 (24 Ky. Law Rep. 710); *Allen v. Pulliam*, (Ky.) 66 S. W. Rep. 722 (23 Ky. Law Rep. 2129); *Kentucky Union Co. v. Cornett*, 112 Ky. 677 (66 S. W. Rep. 728; 23 Ky. Law Rep. 1921). Where a junior patentee, before any settlement is made on the senior patent, settles within the lap, his possession will extend to the boundaries of his patent, and is not confined to his close; and this rule applies though the junior patentee made his settlement before he made his survey. *Altemus' Assignee v. Potter* (Ky.) 69 S. W. Rep. 1083 (24 Ky. Law Rep. 795).

Sec. 576. Construction of local statutes. Act Cong., Nov. 3, 1851 (7 Stat., 631) construed and applied—Mexican land grant. *De Castro v. Fellom*, 135 Cal. 225 (67 Pac. Rep. 142). Cal. Pol. Code, §§ 3414, 3495, 3499, 3500; Stat. 1893, p. 341, construed and applied—application to purchase land—preferred rights of actual settlers—contest—survey. *Wrinkle v. Wright*, 136 Cal. 491 (69 Pac. Rep. 148). Ga. Pol. Code, § 1696 construed and applied—lease of oyster lands by county commissioners. *Parsons v. Prey*, 115 Ga. 955 (42 S. E. Rep. 234). Ky. Stat., § 4703 construed and applied—preference given to actual settlers—entry and survey without notice. *Slusher v. Simpson*, (Ky.) 67 S. W. Rep. 380 (23 Ky. Law Rep. 2252). For construction of Maine Resolves concerning Revolutionary soldiers' lands, see *Burleigh v. Mullen*, 95 Me. 423 (50 Atl. Rep. 47); *Banton v. Crosby*, 95 Me. 429 (50 Atl. Rep. 86). N. C. Code, § 2751, subd. 1, and § 2755 construed and applied—collateral attack of grant of land covered by water. *Holley v. Smith*, 130 N. C. 85 (40 S. E. Rep. 847). N. C. Code, § 2765 construed and applied—proceedings for determining conflicting claims of persons entering on public lands—filing of caveat. *In re Drury*, 130 N. C. 342 (41 S. E. Rep. 937). N. C. Code, §§ 2780, 2786 construed and applied—grant from state—contest for fraud—right of junior grantee. *Henry v. McCoy*, 131 N. C. 586 (42 S. E. Rep. 955). Hill's Ann Or. Laws, §§ 3598, 3607; Laws 1899, p. 157, construed and applied—conclusiveness of decisions of state land board. *Robertson v. Geer*, 42 Or. 183 (70 Pac. Rep. 614). Texas Const., art. 14, § 6; Laws 1889, p. 48, construed and applied—constitutionality of statute giving preference right to actual settler. *Yocham v. McCurdy*, 95 Tex. 336 (67 S. W. Rep. 316). Tex. Laws 1854, p. 29 construed and applied—defective headright certificate. *Sheppard v. Avery*, 95 Tex. 501 (68 S. W. Rep. 505). Tex. Laws 1883, ch. 88, §§ 12, 14; Laws 1889, p. 119, construed and applied—sale of lands by state—title to mineral location. *Heil v. Martin*, 96 Tex. 209 (71 S. W. Rep. 814). Tex. Laws. 1887, p. 83, ch. 99; Laws 1895, p. 63, ch. 47; Laws 1897, p. 186, ch. 129, construed and applied—sale of lands during term of lease. *Tolleson v. Rogan*, 96 Tex. 424 (73 S. W. Rep. 520). Tex. Laws 1889, p. 116; Laws 1895, p. 197; Rev. Stat. 1895, arts. 3498a, 3498b, 3498k, construed and applied—mineral lands—patents. *Colquitt-Tigner Min. Co. v. Rogan*, 95 Tex. 452 (68 S. W. Rep. 154). Wyo. Rev. Stat., § 815 construed and applied—lease of waste land—reclamation—re-

newal of lease. *State v. State Board of Land Com'rs*, 10 Wyo. 413 (69 Pac. Rep. 562).

Sec. 577. Water rights on public lands. The riparian rights of a preemptor of public lands as against private parties attach at the time of settlement on the land, and not at the date of final proof. *Lone Tree Ditch Co. v. Cyclone Ditch Co.*, 15 S. Dak. 519 (91 N. W. Rep. 352). A settler upon public lands of the United States may appropriate water and acquire the right to the use thereof upon such lands, and such right may be sold by him, or, in case of his death, the right descends to his heirs. *Hall v. Blackman*, Ida. (68 Pac. Rep. 19). One who appropriates the waters of a stream running through public land acquires a special property therein, as against all persons acquiring rights subsequent in time, either as appropriators or as riparian proprietors, and may, as against such persons, insist that the waters shall be at all times subject to his use and enjoyment, to the extent of his original appropriation. *Britt v. Reed*, 42 Or. 76 (70 Pac. Rep. 1029).

Sec. 578. Miscellaneous notes. The issue of a patent to lands to a railroad company by the land department, pending a controversy between one claiming them as a homestead on public lands and a railroad company claiming them under a grant, terminates the jurisdiction of the department, although the patent was inadvertently issued. *Northern Pac. Ry. Co. v. Spray*, 27 Wash. 1 (67 Pac. Rep. 377). Where two persons making a special entry on land do not obtain their grant until after the intervention of two hiatuses, it is held that two other persons who made two younger entries on the same land and obtained two grants before said hiatuses have superior title to the senior entrymen claiming under a grant issued after the hiatuses. *Sheafer v. Mitchell*, 109 Tenn. 181 (71 S. W. Rep. 86). As to assignability of entry of land under California desert land act of 1877, see *Phillips v. Carter*, 135 Cal. 604 (67 Pac. Rep. 1031; 87 Am. St. Rep. 152).

QUIETING TITLE.

EPITOME OF CASES.

Sec. 579. As to when the action will lie and who may maintain it. A suit to remove a cloud on title by a sale under a judgment will lie where it does not appear on the face of the judgment that it was ineffectual to convey a good title. *Kittles v. Williams*, 64 S. C. 229 (41 S. E. Rep. 975). The holder of a certificate of purchase at an execution sale in possession may maintain an action to quiet title, under *Ariz. Rev. Stat. 1887, § 3122. Oliver v. Dougherty, Ariz.* (68 Pac. Rep. 553). One having merely a right of redemption in lands sold for taxes cannot maintain a suit to remove a cloud upon the title. *Mathews v. Glenn*, 100 Va. 352 (41 S. E. Rep. 735). Remaindermen may maintain a bill to set aside claims constituting a cloud on their title, although their right to possession has not accrued. *Wiley v. Bird*, 108 Tenn. 168 (66 S. W. Rep. 43). Cal. Code Civ. Proc., §738, does not authorize an action by one having an executory contract for the purchase of land, to obtain judicial construction of his contract. *Cooper v. Birch*, 137 Cal. 472 (70 Pac. Rep. 291). In Nebraska a party out of possession may maintain a suit in equity to quiet the title to real estate. *Lyon v. Gombert*, 63 Neb. 630 (88 N. W. Rep. 774). The possessory right given to an administrator to the real estate of his decedent by the laws of Nebraska is not such an interest as will enable him to maintain an action to quiet title to such real estate, under *Comp. Stat. 1899, ch. 73, § 57. Youngson v. Bond*, 64 Neb. 615 (90 N. W. Rep. 556). Certificates of tax sales based upon a void assessment may be removed as a cloud upon title. *Moore v. Clackamas County*, 40 Or. 536 (67 Pac. Rep. 662). A court is not deprived of jurisdiction of an action to determine an adverse claim of title, brought under B. & C. Ann. Or. Stat., § 516 by plaintiffs in possession who allege ownership in fee, because of an answer by defendant alleging ownership in fee subject to a life estate owned by plaintiffs. *Winchester v.*

Hoover, 42 Or. 310 (70 Pac. Rep. 1035). Construing and applying Pa. Laws 1893, p. 415, giving the right of an action to quiet title to any person in possession of land and claiming to hold or own possession by any right or title whatsoever, whose "right or title or right of possession shall be disputed or denied," it is held that an owner of land who has given an option thereon which he claims has not been fully exercised, may sue to remove it as a cloud upon his title; and that the remedy given by the statute is cumulative and does not take away any of the existing remedies between vendor and vendee. Ullom v. Hughes, 204 Pa. St. 305 (54 Atl. Rep. 23). Such an action by a vendor is barred by a judgment against him in a previous action brought by him to set aside the option for default. Vankirk v. Patterson, 204 Pa. St. 317 (54 Atl. Rep. 175).

Sec. 580. Equitable nature of action—Effect of statutes. The action to determine adverse claims to real estate, given by Minn. Gen. Stat. 1894, ch. 75, is substantially an equitable one, and, except as otherwise provided by statute, all the ordinary rules governing suits in equity to quiet title apply to the action. Mathews v. Lightner, 85 Minn. 333 (88 N. W. Rep. 992; 89 Am. St. Rep. 558). The provisions of S. Dak. Comp. Laws, § 5449, concerning actions to determine adverse titles, do not change the nature of the jurisdiction of the court in an action to quiet title, but such jurisdiction remains purely equitable. Reichelt v. Perry, 15 S. Dak. 601 (91 N. W. Rep. 459). The court say: "Courts of chancery have jurisdiction to remove clouds from title, irrespective of statutes on the subject, and when an alleged owner is in possession his remedy in equity is apparently exclusive. 2 Beach, Eq. Jur. § 556, and notes: Ormsby v. Rarr, 22 Mich. 80; Hosleton v. Dickinson, 51 Ia. 244 (1 N. W. Rep. 550); Willis v. Sweet, 49 Wis. 505 (5 N. W. Rep. 895); Poston v. Balch, 69 Mo. 115; Moran v. Moran, 106 Mich. 8 (63 N. W. Rep. 989; 58 Am. St. Rep. 462). Even where the complaint does not give jurisdiction, but the defendant by answer or counterclaim seeks to quiet title in himself, equity will retain jurisdiction, and proceed to a final determination of all the matters at issue."

Sec. 581. Possession by plaintiff required. The general rule requiring the plaintiff to show possession was held not to obtain against a lessor seeking to set aside a tax title and quiet his title to the reversion as against his lessee who had

obtained the tax title by a fraudulent violation of his covenant to pay taxes. *Oppenheimer v. Levi*, 96 Md. 296 (54 Atl. Rep. 74; 60 L. R. A. 729). The general rule in Alabama that one out of possession cannot maintain a bill to quiet title is subject to an exception in favor of such an action by a remainderman pending possession by the life tenant. *Worthington v. Miller*, 134 Ala. 420 (32 So. Rep. 748). Ala. Code, § 809 construed and applied—character of possession required of plaintiff. *Braan v. United States Car Co.*, 128 Ala. 579 (30 So. Rep. 60). A bill by a grantor in a deed to cancel it on account of his insanity at the time of its execution must show that the complainant was in possession at the time of the filing of the bill. *Galloway v. McLain*, 131 Ala. 280 (31 So. Rep. 603). The grantor in a deed alleged to have been obtained by fraud does not acquire the possession necessary to enable him to maintain an action for its cancellation by entering into contracts with the subtenants of his grantee to lease the premises to them. *Treadwell v. Torbert*, 133 Ala. 504 (32 So. Rep. 126). In Florida, where the complainant's title to real estate is a legal one, he must be in possession in order to maintain a suit in equity to remove a cloud from such title, unless the land is wild, unimproved, and so unoccupied as not to destroy the constructive possession that follows the legal title; and the bill must allege such possession, or such unoccupied condition of the land, else it is subject to demurrer for want of equity. *Clem v. Meserole*, Fla. (32 So. Rep. 783). The rule in Illinois requiring plaintiff to show possession or that the lands are unimproved and unoccupied, is held not to apply where the deed or other instrument alleged to be a cloud upon the title is sought to be set aside upon the ground of fraud. *Clay v. Hammond*, 199 Ill. 370 (65 N. E. Rep. 352; 93 Am. St. Rep. 146). Where a plaintiff's allegation of possession is denied, a decree in his favor will not be sustained on appeal where there is no finding in the decree on the subject of possession, and there is no certificate of evidence containing any proof as to possession. *Glos v. Cratty*, 196 Ill. 193 (63 N. E. Rep. 690). To sustain an action to try title against a party out of possession, under N. Y. Code Civ. Proc., §§ 1638, 1639, the plaintiff must allege and prove that he or his grantor has been in possession of the property for one year before institution of the suit. *Lewis v. Howe*, 174 N. Y. 340 (66 N. E. Rep. 975). Under Okla. Civ. Code, § 613, an action to quiet title may be maintained by the holder of the legal title when he is not in possession, if the premises be vacant and unoccupied; otherwise

the plaintiff must be shown to be in the actual possession, either by himself or by tenant. *Christy v. Springs*, 11 Okla. 710 (69 Pac. Rep. 864). Under B. & C. Ann. Or. Stat., § 516, a person claiming an interest or estate in real property not in the possession of another may maintain a suit to remove a cloud on his title without being in the actual possession of the premises; and this statute is not rendered unconstitutional because a jury trial is not allowed in it. *McLeod v. Lloyd*, 43 Or. 260 (71 Pac. Rep. 795). For further construction of this statute, see *Winchester v. Hoover*, 42 Or. 310 (70 Pac. Rep. 1035). In Virginia a bill to remove a cloud on title cannot be maintained by any one out of possession. *Neff v. Ryman*, 100 Va. 521 (42 S. E. Rep. 314). The holder of the legal title, in actual possession of the surface of land underlain by undeveloped minerals,—no mines having been opened—has a sufficient possession to enable him to sue to remove a cloud on his title, consisting of a deed purporting to convey the underlying minerals. *Steinman v. Vicars*, 99 Va. 595 (39 S. E. Rep. 227). An action to quiet title may be maintained by one put in possession under a contract of sale, under 2 Ball. Ann. Wash. Codes & Stat., § 5521, authorizing such an action by one in possession by himself or his tenant. *Bigelow v. Brewer*, 29 Wash. 670 (70 Pac. Rep. 129). It is not necessary that one should actually live on or be on lands, in order to maintain the actual possession necessary in a suit to quiet title. *Maggs v. Morgan*, 30 Wash. 604 (71 Pac. Rep. 188). Claimants of title by virtue of a sheriff's deed may maintain an action against adverse claimants, under Wash. Ann. Codes & Stat., § 5521, to try title or remove clouds, where it appears that the property was not in the actual possession of any one at the time of the commencement of the action. *Rohrer v. Snyder*, 29 Wash. 199 (69 Pac. Rep. 748). Construing and applying Bal. Ann. Wash. Codes & Stat., §§ 5500, 5508, 5521, it is held that the holder of an equitable title out of possession cannot maintain an action in the nature of a suit in equity to quiet and remove cloud from title, but only an action for possession, in which he may have his title quieted, and the cloud removed therefrom. *Povah v. Lee*, 29 Wash. 108 (69 Pac. Rep. 639).

Sec. 582. Complaint in action to quiet title. Under Burns' Ind. Rev. Stat., § 1082, a complaint to quiet title alleging that the plaintiff is the owner and in possession of the land and that the defendant claims an interest therein which is ad-

verse and unfounded, is sufficient on demurrer. *City of Huntington v. Townsend*, 29 Ind. App. 269 (63 N. E. Rep. 36). A complaint which alleges that the plaintiff is the owner in fee of the land and entitled to the possession thereof, and that the defendant's title is unfounded and without right, is sufficient without a special averment that the defendant's claim of title is "adverse." *Brown v. Cox*, 158 Ind. 364 (63 N. E. Rep. 568). In Indiana, it is sufficient for a complaint to quiet title to aver that the plaintiff is the owner of the real estate without specially averring the kind of title, and that the defendant's claim is unfounded and a cloud upon plaintiff's title. It is not necessary that the plaintiff describe generally or particularly the defendant's claim of title or anticipate any defense he may make. *City of Lafayette v. Wabash R. Co.*, 28 Ind. App. 497 (63 N. E. Rep. 237). The same is held in Colorado. *Schlageter v. Gude*, 30 Colo. 310 (70 Pac. Rep. 428). A complaint by an executrix of a will filed both in her individual and representative capacity, which seeks to quiet title to real estate of the testator in her individually, is insufficient on demurrer on account of failure to state any cause of action in favor of the executrix. *Hughes v. Hughes*, Ind. App. (63 N. E. Rep. 250). A complaint to quiet title to land which describes the land as a certain quarter section "except 10 acres around well number one," is insufficient on account of indefiniteness of description. *Jones v. Mount*, 30 Ind. App. 59 (63 N. E. Rep. 798). An allegation in a complaint to quiet title to real estate that the plaintiff is the owner of the right to purchase all of said real estate from the defendant is not a sufficient allegation of ownership. *Cooper v. Birch*, 137 Cal. 472 (70 Pac. Rep. 291). An allegation by a plaintiff in a complaint to quiet title that he is a grantee with warranty from one to whom another had previously conveyed the land with warranty, agreeing that he was seized in fee simple, is not a sufficient averment of title to sustain an action, under Wis. Rev. Stat. 1898, § 3186. *Van Hessen v. Chippewa Valley Mercantile Co.*, 115 Wis. 443 (91 N. W. Rep. 1008). Ala Code, §§ 809-813 construed and applied—bill to cancel conveyance—effect of failure to offer return of consideration. *Sloss-Sheffield Steel & Iron Co. v. Board of Trustees of University*, 130 Ala. 403 (30 So. Rep. 433). For further construction of this statute, as to sufficiency of complaint, see *Bledsoe v. Price*, 132 Ala. 621 (32 So. Rep. 325). As to sufficiency of particular complaints, see *McLeod*

v. Lloyd, 43 Or. 260 (71 Pac. Rep. 795); *Miller v. Pierce County*, 28 Wash. 110 (68 Pac. Rep. 358).

Sec. 583. Parties and defenses. Where the cloud as-sailed consists of a sheriff's deed alleged to have been procured by fraudulent collusion with the debtor he is a proper party defendant. *Worthington v. Miller*, 134 Ala. 420 (32 So. Rep. 748). Where one who has made a contract for the sale of lands on installments, stipulating for its forfeiture in case of vendee's failure to make payments when due, before maturity of the first installment, sells the same to another, giving him the right of possession the second vendee is a necessary party to an action to quiet title brought by the vendor against his first vendee. Cal. Code Civ. Proc., §§ 378, 379, 382, 389 applied. *Birch v. Cooper*, 136 Cal 636 (69 Pac. Rep. 420). Cal. Code Civ. Proc., § 381 construed and applied—joinder of parties plaintiff—waiver of objection to misjoinder. *Dewey v. Parcells*, 137 Cal. 305 (70 Pac. Rep. 174). Applying *Burns' Ind. Rev. Stat.*, § 1067, permitting a defendant to prove under a general denial every defense, it is held that where a complaint alleges that defendants claim some interest in the premises through certain mortgages, and as heirs of the deceased grantee, they could prove under their general denial the execution and recording of such mortgages and the probate of the will of such grantee. *Kaufmann v. Preston*, 158 Ind. 361 (63 N. E. Rep. 570).

Sec. 584. Judgment in action to quiet title—Recording—Force and effect. A decree quieting title is binding on one against whom it is rendered, and those claiming under him, although no transcript thereof is filed by the clerk with the recorder and auditor, as required by *Burns' Ind. Rev. Stat.*, §§ 1085, 7939. *Skelton v. Sharp*, 161 Ind. 383 (67 N. E. Rep. 535). Where, in an action brought by a grantee against his grantor to quiet title to land claimed by the plaintiff to be embraced in the deed, the grantor admits the conveyance but dis-claims any title or right in the land, and there is a judgment for the plaintiff, such judgment creates an estoppel running with the land, operating to vest in plaintiff all of defendant's title, without regard to the construction of the deed, even as against persons not parties to that action, unless they claim under a deed executed by defendant prior to the institution of the action. *Kentucky Union Co. v. Cornett*, 112 Ky. 677 (66 S. W. Rep. 728; 23 Ky. Law Rep. 1922).

Sec. 585. Practice in action to quiet title—Miscellaneous notes—Statutes construed. Applying Ala. Code, §§ 809, 810, it is held that where plaintiff's bill does not call on defendants to set forth their title, it cannot be adjudicated on their answer alone; nor can a cross bill be maintained by one out of possession after dismissal of the original bill. *Mayer v. Calera Land Co.*, 133 Ala. 554 (31 So. Rep. 938). Proof of an equitable title by a plaintiff alleging title in fee is not such a variance as precludes recovery, where the statute (Ariz. Rev. Stat. 1887, § 3132) provides that an action to determine and quiet title to real estate may be brought by any one claiming an interest, whether in or out of possession. *Oliver v. Dougherty*, Ariz. (68 Pac. Rep. 553). In California, in an action to quiet title, a denial of the allegations of the complaint is a sufficient answer, and a finding upon the issues thus raised, if adverse to the plaintiff, a sufficient finding. *United States Land Ass'n v. Pacific Imp. Co.*, 139 Cal. 370 (69 Pac. Rep. 1064). Cal. Code Civ. Proc., §§ 318, 319 construed and applied—statute of limitations. *San Francisco & F. Land Co. v. Hartung*, 138 Cal. 223 (71 Pac. Rep. 337). Applying Colo. Code, § 255, it is held that where a defendant answers a complaint containing the general allegations of a complaint to quiet title, by setting up his title specifically, the plaintiff may allege facts in his reply confirming his title by the statute of limitations. *Schlageter v. Gude*, 30 Colo. 310 (70 Pac. Rep. 428). In an action under Mass. Stat. 1889, ch. 442, the court cannot consider or determine prescriptive rights, but only such as appear of record. *Crocker v. Cotting*, 181 Mass. 146 (63 N. E. Rep. 402). Mo. Rev. Stat. 1899, § 647 is repealed by § 650. *Meriwether v. Love*, 167 Mo. 514 (67 S. W. Rep. 250). This latter section does not repeal or abrogate the statute (Rev. Stat. 1899, ch. 24) in regard to ejectment; and a finding for the plaintiff in an action under § 650 does not authorize a judgment for restitution of the premises. *Bedford v. Sykes*, 168 Mo. 8 (67 S. W. Rep. 569). Where, in an action to quiet title, under N. C. Laws 1893, ch. 6, a defendant's claim to an interest in the timber on the land under a contract is found to be invalid, it is not proper for the court to dismiss the action, but the plaintiff is entitled to a decree adjudging the contract invalid as a lien on the land. *Rumbo v. Gay Mfg. Co.*, 129 N. C. 9 (39 S. E. Rep. 581). Or. Code, § 504, as amended by Laws 1899, p. 227, construed and applied—action by plaintiff not in possession—proof required that land is not in possession of

another. *Moore v. Shofner*, 40 Or. 488 (67 Pac. Rep. 511). For a discussion of the distinction maintained in Oregon between a suit to remove a cloud upon a title and an action to quiet title, see *Moore v. Clackamas County*, 40 Or. 536 (67 Pac. Rep. 662). For cases determining particular questions as to admissibility of evidence, see *Bigelow v. Brewer*, 29 Wash. 670 (70 Pac. Rep. 129); *Anderson v. Anderson*, 95 Tex. 367 (67 S. W. Rep. 404). As to burden of proof, see *Collier v. Carlisle*, 133 Ala. 478 (31 So. Rep. 970).

REAL ACTIONS.

EPITOME OF CASES.

Sec. 586. Jurisdiction over unborn or unascertained parties through representation by trustee. Notwithstanding there are many contingent limitations of a trust, a decree to which the trustees and the one in whom the first remainder of the inheritance is vested are parties is binding on all that may come after, though not in esse, unless there be fraud and collusion between the trustees and such first remainderman. *Perkins v. Burlington Land & Imp. Co.*, 112 Wis. 509 (88 N. W. Rep. 648). The court say: "In a case decided by that very able equity jurist, Lord High Chancellor Hardwicke, more than 160 years ago, it was among other things, said and held that, 'if there are ever so many contingent limitations of a trust, it is an established rule that it is sufficient to bring the trustees before the court, together with him in whom the first remainder of the inheritance is vested, and all that may come after will be bound by the decree, though not in esse, unless there be fraud and collusion between the trustees and the first person in whom a remainder of inheritance is vested.' *Hopkins v. Hopkins*, 1 Atk. 581, 590. That was expressly sanctioned in a later case. *Marquis Cholmondeley v. Lord Clinton*, 2 Jac. & W. 1, 133. See, also, *Biscoe v. Perkins*, 1 Ves. & B. 485; *Collier v. Walters*, L. R. 17 Eq. 252; *Trust Co. v. Roche*, 116 N. Y. 120 (22 N. E. Rep. 265); *Campbell v. Watson*, 8 Ohio, 498; *Baylor's Lessee v. Dejarnette*, 13 Grat. 152. Thus it is

held in Georgia that 'when the person who is to take the remainder is not ascertained, and the remainder is contingent, it is sufficient to have before the court the trustees to support the contingent remainder, and the persons in esse having title to the vested estates.' *Schley v. Brown*, 70 Ga. 64. So it has been held in New York that 'where an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto, and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand not only for themselves, but also for the persons unborn.' *Kent v. Church of St. Michael*, 136 N. Y. 10 (32 N. E. Rep. 704; 18 L. R. A. 331; 32 Am. St. Rep. 693). So it has been held in Illinois that 'on creditors' bill to set aside a deed of land to a trustee in trust to collect and pay rents to a married woman during her life, and at her death to convey to the children she might leave surviving, on the ground that such deed is in fraud of creditors of the grantor, the children of such married woman are not necessary parties. In such case the trustee represents the contingent interest of the children, and a decree setting aside the deed of trust is binding on them the same as if made parties.' *Temple v. Scott*, 143 Ill. 290 (32 N. E. Rep. 366). In another case in the same volume, it was held that 'where land is devised in trust to trustees to collect the rents, etc., and pay the same to a daughter of the testator during her life, and at her death to convey the same to her issue in such manner and shares as she may direct by will, and, in the event she leaves no issue, then to certain other persons at her death, the legal title will not vest in her children, and they will not become necessary parties to a bill by a third person to have a part of the land sold, but it will be sufficient to make such trustees parties.' *Green v. Grant*, 143 Ill. 62 (32 N. E. Rep. 369; 18 L. R. A. 381). So it has been held in that state that 'the general rule that a decree is not binding on one not made a party to the suit is subject to certain well-recognized exceptions. Thus, when a party is before the court by representation, and in such a way that his interest must be deemed to have been as fully and effectually presented and protected as it would have been if he had been personally present, his rights will be concluded by the decree.' *McCampbell v. Mason*, 151 Ill. 500 (38 N. E. Rep. 672). The case at bar is clearly distinguishable from those where there is no uncertainty as to the persons in whom

the remainder vests. *Patton v. Ludington*, 103 Wis. 630 (79 N. W. Rep. 1073; 74 Am. St. Rep. 910). Of course, the case is distinguishable from those where the trustee has no right of management or control, no right of possession, no power of disposition, or where there is no trustee having right or authority to represent such contingent interests."

Sec. 587. Jurisdiction depending on action involving boundaries or title. The statute denying the supreme court of Texas jurisdiction in "all cases of boundary," does not deprive it of jurisdiction of an action on notes given for the purchase price of land and to enforce a vendor's lien thereon, where the defendants deny that the plaintiff had title to the land sold, although the sole issue of fact is the location of a certain boundary. *Steward v. Coleman County*, 95 Tex. 445 (67 S. W. Rep. 1016). For the purpose of determining whether an action is one to quiet title to an easement in land so as to require its being brought in the county in which the land is situated, both the complaint and answer in the action may be considered. *Miller v. Kern County Land Co.*, Cal.

(70 Pac. Rep. 183). Under Cal. Code Civ. Proc., § 838, a justice court has no jurisdiction to try an action in which it appears that the right of possession and title to land is involved, and the raising of such an issue by an unverified answer is sufficient to oust the jurisdiction. *King v. Kutner-Goldstein Co.*, 135 Cal. 65 (67 Pac. Rep. 10). A freehold is held not to be involved, so as to authorize an appeal to the supreme court of Illinois, in an action to set aside a judgment, and to remove the transcript thereof and the execution and levy, on the ground that the court rendering the judgment did not have jurisdiction, *Helton v. Elledge*, 199 Ill. 95 (64 N. E. Rep. 1091); and the same is held as to proceedings before a justice of the peace to recover a penalty for the obstruction of a highway by a fence, *Seidschlag v. Town of Antioch*, 198 Ill. 413 (64 N. E. Rep. 969). But it is held that a freehold is involved in proceedings to restrain the enforcement of a justice's judgment imposing a penalty for the obstruction of a highway, where the decree contains findings on the disputed question of who owns the land, *Village of Dolton v Dolton*, 196 Ill. 154 (63 N. E. Rep. 642); and in an attachment of land in which a third party intervenes denying the title of the attachment defendant, *Alsdurf v. Williams*, 196 Ill. 244 (63 N. E. Rep. 686); and in proceedings to vacate a highway and establish another, *Perry v. Bozarth*, 198

Ill. 328 (64 N. E. Rep. 1076). See opinion for construction of statutes as to proper practice where action involving a freehold is erroneously appealed to the appellate court. Kan. Laws 1895, ch. 96, § 14 construed and applied—jurisdiction of supreme court of actions involving title. *Tarr v. Abrams*, 64 Kan. 887 (68 Pac. Rep. 605). A suit to enforce a mechanic's lien does not involve "title to real estate" so as to give the supreme court jurisdiction of an appeal, under Mo. Const., art. 6, § 12, although there was a side issue of who was the owner, in order to determine whether notice was given the proper person. Such court has jurisdiction under the provision referred to only when the judgment itself affects the title to land. *P. M. Bruner Granitoid Co. v. Klein*, 170 Mo. 225 (70 S. W. Rep. 687). An action to set aside conveyances of land made by a debtor to a third person and by him to the debtor's wife, as a fraud upon the creditors of such debtor, involves title to real estate so as to give the supreme court of Missouri appellate jurisdiction. *Balz v. Nelson*, 171 Mo. 682 (72 S. W. Rep. 527). But the contrary is held as to a suit by a creditor of a woman to have the title to property, which her children had divested out of her on the ground of a resulting trust in their favor, deemed to be in her as to him on account of his having made a loan to her on the faith of its being in her name. *Klingelhoefer v. Smith*, 171 Mo. 455 (71 S. W. Rep. 1008). In North Carolina a justice of the peace has no jurisdiction of an action of ejectment by a mortgagee against a mortgagor in possession, where title to realty is involved, notwithstanding an allegation that the mortgagor is a tenant of the mortgagee. *Smith v. Garriss*, 131 N. C. 34 (42 S. E. Rep. 445). Construing and applying Vt. Stat., § 1040, denying justices of the peace jurisdiction of actions of trespass involving title, where the damage claimed exceeds twenty dollars, it is held that upon appeal in such an action in which the damage claimed did not exceed twenty dollars, an amendment increasing the claim for damages from twenty to one hundred dollars deprives the appellate court of jurisdiction. An action for trespass for cutting down growing trees involves title. *Heath v. Robinson*, 75 Vt. 133 (53 Atl. Rep. 995).

Sec. 588. Jurisdiction of courts of equity. Equity has no jurisdiction of an action in ejectment, and such an action is stated by a bill alleging that plaintiffs have the title to and right to possession of land and are kept out of possession by

the defendants who claim title, although an accounting is asked and an injunction requiring the defendants to vacate is prayed for, such demand for equitable relief being premature. *Williams v. Fowler*, 201 Pa. St. 336 (50 Atl. Rep. 969). A court of equity decreeing for a plaintiff claiming title to real estate, the cancellation of certain instruments affecting such title, on account of the insanity of the grantor executing them, cannot put him in possession by the issuance of a writ of assistance, but, as to possession, he will be left to his remedy at law. *Clay v. Hammond*, 199 Ill. 370 (65 N. E. Rep. 352; 93 Am. St. Rep. 146; See pp. 154-165 for exhaustive note on "Jurisdiction of equity to put party in possession in aid of its decree").

Sec. 589. Jurisdiction—When determined by residence of party or location of land. An action to compel specific performance of an agreement to convey land, if the defendant's obligation is in contract, merely, without any element of trust, is an action in personam, and must be brought in the county where the defendant resides, and not of necessity in the county where the land is situated. *Close v. Wheaton*, 65 Kan. 830 (70 Pac. Rep. 891). An action for the cancellation of mortgages on account of their having been procured by fraud is transitory and need not be brought where the land lies, but the jurisdiction is in the county of the defendant's residence; and this rule is not changed by Ky. Stat., § 11. *Shouse v. Taylor*, Ky. (72 S. W. Rep. 324; 24 Ky. Law Rep. 1842). The jurisdiction of an action against the sureties on a sheriff's bond for a trespass committed by his deputy, to which neither the sheriff nor such deputy is made a party, is in the county of the residence of the bondsmen, and not where the trespass was committed; Tex. Rev. Stat., art. 1194, subd. 9, requiring an action for trespass to be brought in the county where the trespass was committed, applying only when the action is against the trespasser individually. *Lasater v. Waits*, 95 Tex. 553 (68 S. W. Rep. 500). A judgment constituting a lien on land, even after levy of execution thereunder, does not give the holder any estate, right or interest in the land, so as to require an action for the vacation of the same to be brought where the land lies, under Minn. Gen. Stat., 1894, §§ 5182, 5183. *State v. District Court of Chippewa Co.*, 85 Minn. 283 (88 N. W. Rep. 755). Where the parties agree that a bond given for a part of the purchase price of land shall be enforced out of a par-

ticular tract of land, the court in the county where such tract lies has jurisdiction of an action for the enforcement of the bond. N. C. Code, § 190 (3) applied. *Connor v. Dillard*, 129 N. C. 50 (39 S. E. Rep. 641).

Sec. 590. Stare decisis—Overruled cases. A rule of property is not established by a decision of the supreme court construing the provisions concerning the exemption of property from taxes contained in the charter of a seminary, which were unlike those contained in any other seminary charter; so as to make the rule of stare decisis applicable to prevent the overruling of such decision. *Colorado Seminary v. Board of Com'rs*, 30 Colo. 507 (71 Pac. Rep. 410). An overruled decision is regarded not law, as never having been the law, but the law as given in the later case is regarded as having been the law, even at the date of the erroneous decision. To this rule there is one exception,—that where there is a statute, and a decision giving it a certain construction, and there is a contract valid under such construction, the later decision does not retroact so as to invalidate such contract. *Falconer v. Simons*, 51 W. Va. 172 (41 S. E. Rep. 193).

Sec. 591. Former adjudication—Who bound by. An adjudication against a husband's claim of homestead in land made by him in litigation involving this right is conclusive against his wife although she was not a party. *Frazier v. Brashears*, (Ky.) 66 S. W. Rep. 1038; 23 Ky. Law Rep. 2232. A creditor of an heir seeking to establish a lien upon the heir's undivided interest in lands of his ancestor is bound by a previous judicial ascertainment by a court of competent jurisdiction as to an advancement made to such heir, and takes subject thereto. *Comer v. Shehee*, 129 Ala. 588 (30 So. Rep. 95; 87 Am. St. Rep. 78). A default judgment entered by publication service against the "Farmers' Loan & Trust Company," purporting to bar the lien of a mortgage assigned of record to the "Farmers' Loan & Trust Co., trustee" is not binding upon the "Farmers' Loan & Trust Company, trustee." *Farmers' Loan & Trust Co. v. Essex*, 66 Kan. 100 (71 Pac. Rep. 268). No alienee, grantee, assignee, or mortgagee is bound or affected by a judgment or decree rendered in a suit commenced by or against the alienor, assignor, or mortgagor subsequent to the alienation, grant, assignment, or mortgage, to which he is not a party. *Austin v. Hoxsie*, Fla. (32 So. Rep. 878).

A contingent interest in real estate is bound by a judgment in an action to quiet the title thereto where the court has before it all the parties that can be brought before it, and it acts on the property according to the rights that appear, there being no fraud or collusion. *Mathews v. Lightner*, 85 Minn. 333 (88 N. W. Rep. 992; 89 Am. St. Rep. 558).

Sec. 592. Former adjudication—Judgment against tenant by third party—When binds landlord. A judgment in favor of the plaintiff in an action of ejectment, rendered against a tenant in possession, does not bind his landlord, where he was neither a party to the action nor had any notice thereof. *Sanford v. Tanner*, 114 Ga. 1005 (41 S. E. Rep. 668). The court say: "It is claimed that a judgment in ejectment against a tenant, even where the real owner of the land was not a party to, had no notice of, and took no part in the proceedings in such a case, is binding on such real owner; but in our opinion this contention is not sound. In 1 Freem. Judm. § 185, the rule is thus stated: 'If the landlord did not participate in the defense, and was not notified of the pendency of the previous action, the judgment rendered therein is not admissible against him for any purpose except to show the fact of its recovery, and that the defendant therein had ceased to hold as his tenant.' In the case of *Read v. Allen*, 58 Tex. 380, it was ruled that 'a judgment against a tenant rendered in a cause to which his landlord is not a party, and of which he had no notice, can not affect the landlord's title.' Rulings in the following cases are also to the same effect: *Chant v. Reynolds*, 49 Cal. 213; *Stridde v. Saroni*, 21 Wis. 175; *Brant v. Church*, 110 N. Y. 537 (18 N. E. Rep. 357); *Oetgen v. Ross*, 47 Ill. 142 (95 Am. Dec. 468); *Powers v. Scholtens*, 79 Mich. 299 (44 N. W. Rep. 613)."

Sec. 593. Former adjudication—Particular cases. Where a contractor conveyed certain property and thereafter contracted with his vendee to erect houses thereon, proceedings brought by others to foreclose mechanic's liens are not res adjudicata as against such claimants or others having like claims made defendants, as to the ownership of the property as between the vendor and vendee. *Shryock v. Hensel*, 95 Md. 614 (53 Atl. Rep. 412). A judgment appropriating land, rendered in condemnation proceedings to which the owner was made a party and who accepts the damages awarded him, is

conclusive as to the constitutionality of the statute under which the appropriation was made, as against a person holding title under such owner. Conn. Laws 1867, ch. 137; Gen. Stat. 1866, tit. 37, ch. 4, construed and applied. *Branch v. Lewrenz*, 75 Conn. 319 (53 Atl. Rep. 658). In an action of ejectment based on a trust deed, a prior decree rendered in a chancery suit between the same parties adjudging that a certain sum was due on account of the debt secured, is admissible to prove a breach, notwithstanding a writ of error has been prosecuted, and a supersedeas granted. *Brown v. Schintz*, 203 Ill. 136 (67 N. E. Rep. 767). A former recovery against a municipal corporation in a suit for damages sustained by a property owner by reason of its maintenance of a nuisance is no bar to a second action brought by him with a view to recovering compensation for damages subsequently arising from the same cause, unless the recovery in the first suit was for prospective damages, as well as for such as had actually been suffered up to the time of the bringing thereof. *Mulligan v. City Council of Augusta*, 115 Ga. 337 (41 S. E. Rep. 604). An adjudication in an action of ejectment between tenants in common, that the defendant owned a certain undivided interest, and the plaintiffs the balance, does not bar him from claiming, in partition proceedings afterwards brought by them against him, an undivided interest with them under an after-acquired title from one not a party to the action in ejectment or the partition proceedings. *Carter v. White*, 131 N. C. 14 (42 S. E. Rep. 442). A judgment in an action brought to recover land claimed under a residuary clause in a deed does not bar another action by the same plaintiffs against the same defendants to recover the land on account of a mistake in the deed. *Davidson v. Mayhew*, 169 Mo. 258 (68 S. W. Rep. 1031). A judgment in favor of a vendor foreclosing his vendee's equity for failure to make payments and adjudging a forfeiture of payments made and that the vendor had fully complied with his contract, bars an action by the vendee to rescind the contract and recover the payments made. *Bingham v. Kearney*, 136 Cal. 175 (68 Pac. Rep. 597). Where a bankrupt acquires an interest in property as an heir of his sister after a sale of all his interest in the property by his assignee in bankruptcy, an order of the United States district court denying his motion to set aside the assignee's sale on the ground that he had no interest in the property at the time he was adjudged a bankrupt, is not *res adjudicata* of the question as to whether he or his sister was owner

of the property at the time of the adjudication. *Cramer v. Wilson*, 202 Ill. 83 (66 N. E. Rep. 869).

Sec. 594. Tender. A conditional tender is ineffectual unless it appears that it is the duty of the party to whom the tender is made to perform the condition named. *Mott v. Rutter*, N. J. (54 Atl. Rep. 159). The holder of a note and mortgage given in consideration of the execution of a conveyance of land cannot maintain an action thereon without first tendering the deed, and a mere offer to execute the deed and "place it in the hands of the judge of the court" is not a sufficient tender. *Howard v. Higgins*, 137 Cal. 227 (69 Pac. Rep. 1060). Cal. Civ. Code, §§ 1496, 1498, 1501 construed and applied—tender. *Latimer v. Capay Val. Land Co.*, 70 Pac. Rep. 82 (137 Cal. 286).

Sec. 595. Injunctions—General principles. Injunction cannot be invoked as a remedy for a trifling injury by one who has been guilty of laches. *Stewart Wire Co. v. Lehigh Coal & Nav. Co.*, 203 Pa. St. 474 (53 Atl. Rep. 352). In order for the existence of a legal remedy to bar the right to an injunction such remedy must be plain and adequate, *Ingle v. Bottoms*, 160 Ind. 73 (66 N. E. Rep. 160); and a remedy at law does not bar injunction where the latter remedy is more practical and efficient, *Chappell v. Jasper County Oil & Gas Co.*, 31 Ind. App. 171 (66 N. E. Rep. 515). One whose acts have contributed to the volume of the flow of a ditch cannot have an injunction against its maintenance on the ground of its menacing his fence. *Grosjean v. Lulow*, 118 Ia. 346 (92 N. W. Rep. 64). A resident of a city whose property does not abut on a public park, and who has no interest in it different in degree from that of other residents of the city, cannot enjoin its condemnation for another public use. *Manson v. South Bound R. Co.* 64 S. C. 120 (41 S. E. Rep. 832). Applying *Ida. Rev. Stat.*, § 4288, it is held that a complaint alleging great and irreparable injury to growing crops, and that the damage cannot be justly estimated, will authorize an injunction to restrain the acts complained of. *Wilson v. Eagleson*, *Ida.*

(71 Pac. Rep. 613). Where a grantor sues in equity to set aside his deed and is defeated, his subsequent application for an injunction to restrain the grantee from trespassing on the property, without disclosing the prior adjudication against him, will be dismissed upon such adjudication being brought to the

knowledge of the court. *Tifel v. Jenkins*, 95 Md. 665 (53 Atl. Rep. 429).

Sec. 596. Injunctions—Preliminary or temporary injunction. A complainant who asks a preliminary injunction must show a clear right in himself. If the complainant has no equity, or if the showing of it is doubtful, it is of no significance how defective the title upon which the defendant relies may be. *Dobleman v. Gatley & Hurley Co.*, 64 N. J. Eq. 223 (53 Atl. Rep. 812). See opinion for application of these rules to particular facts. A plaintiff who shows a reservation by deed of the use of track scales and the right to pass over defendant's land and that the defendant denies him such rights, which refusal will ruin his business, is entitled to a temporary injunction. *Darlington Oil Co. v. Pee Dee Oil & Ice Co.*, 62 S. C. 196 (40 S. E. Rep. 169). The issuing of a temporary writ of injunction, the effect of which is to transfer possession of property, is improper. *Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co.*, 116 Ia. 681 (88 N. W. Rep. 1082). Citing, *Beach, Inj.* § 112; *High, Inj.* (2d Ed.) § 601; *Farmers' R. Co. v. Reno, O. C. & P. Ry. Co.*, 53 Pa. 224; *Calvert v. State*, 34 Neb. 616 (52 N. W. Rep. 687); *Arnold v. Bright*, 41 Mich. 207 (2 N. W. Rep. 16). *Ida. Rev. Stat. 1887*, § 4295 construed and applied—motion to dissolve temporary injunction—necessity and requisites of notice. *Thayer v. Bellamy*, *Ida.* (71 Pac. Rep. 544).

Sec. 597. Injunctions—Pleading and practice in action for. The title of the plaintiff in an action to perpetually enjoin trespass being denied by the defendants they may demand that the legal issues be first tried. *Alston v. Limehouse*, 60 S. C. 559 (39 S. E. Rep. 188). In an action to enjoin the lowering of the level of a lake, it is proper to make defendants of all the different persons who contribute to the injury complained of, although they act independently of one another. *Draper v. Brown*, 115 Wis. 361 (91 N. W. Rep. 1001). In New York it is held that in an action to enjoin future overflows of land the plaintiff cannot recover damage for past overflows for which he had a complete action at law at the time of filing the bill. *Stevenson v. Morgan*, 64 N. J. Eq. 219 (53 Atl. Rep. 677). Equity may enjoin a defendant from obstructing a right of way where he admits that the plaintiffs are entitled to a right of way of a given width, although the exact width and location

of the right of way are not definitely settled. *Bright v. Allen*, 203 Pa. St. 386 (53 Atl. Rep. 248). Before one can invoke the aid of a court of equity to compel the removal of an obstruction to a private way title to part of which he claims the fee, subject to the easement, by deeds conveying by metes and bounds land on one side of the way, he first must have his title established at law, and where the right to the other portion is controverted injunction as to it will not issue until the title to the former is determined. *Oppenheim v. Loftus*, N. J. Eq. (50 Atl. Rep. 795). Although Ga. Civ. Code, § 4922, provides that "an injunction can only restrain; it cannot compel a party to perform an act; it may restrain until performance," it is held that upon an application promptly made by a lower riparian owner, an injunction may be granted to prevent an upper owner from diverting the waters of a stream, although the effect of the order may be to require the defendant to destroy a ditch, or do other acts necessary to restore the water to its natural channel; and this is true though the diversion of the water was complete at the time the application for injunction was made. *Goodrich v. Georgia R. & Banking Co.*, 115 Ga. 340 (41 S. E. Rep. 659).

Sec. 598. Injunctions—Causes sufficient for granting. An injunction will lie to restrain a wrongful encroachment on land by the erection of a building, though only a few inches. *Long v. Ragan*, 94 Md. 462 (51 Atl. Rep. 181). The rights of a riparian proprietor to the enjoyment of the stream in its natural state may be protected by injunction. *Webster v. Harris*, Tenn. (69 S. W. Rep. 782; 59 L. R. A. 324). A threatened execution sale of land under a levy made against one other than the holder of the legal title may be enjoined by the latter. *Einstein v. Bank of California*, 137 Cal. 47 (69 Pac. Rep. 616). In Washington, injunction is the proper remedy in a case where the public authorities seek to take private property for a public use without first making compensation therefor. *Olson v. City of Seattle*, 30 Wash. 687 (71 Pac. Rep. 201). Where by fraudulent practices possession of a building standing upon leased land has been obtained, under an agreement with the owner of the building to tear it down or remove it, equity will restrain a party to such contract from using the possession for any purpose other than that for which it was obtained. *Armour v. Connolly*, 63 N. J. Eq. 788 (52 Atl. Rep. 383). A plaintiff claiming a right of way under an

agreement giving him an equitable title thereto, of which he is in the actual possession and enjoyment and over which he is conducting a business which is dependent upon the use of the way, may have an injunction pending litigation to determine his right to the way, against a defendant denying such right and threatening to obstruct the way so as to interfere with and destroy plaintiff's business. *Shreve v. Mathis*, 63 N. J. Eq. 170 (52 Atl. Rep. 234). Conn. Gen. Stat. 1888, §§ 982, 1277 construed and applied—malicious erection of structures to injure adjoining owner—injunction. *Whitlock v. Uhle*, 75 Conn. 423 (53 Atl. Rep. 891).

Sec. 599. Injunctions—Causes insufficient for granting. Injunction will not be granted to restrain an action for rent on the ground that the lease is void because for an illegal purpose, this being a complete defense to the action; but equity will interfere to prevent other suits where such defense has been once successfully asserted. *Slater v. Schwegler*, N. J. Eq. (54 Atl. Rep. 937). An owner of a private alley is not entitled to an injunction against the use of it by another without right, solely on the allegation that such use has continued for eight years, and if continued for twelve years longer will ripen into a right, where, by service of a notice provided for by statute (*Burns. Ind. Rev. Stat.*, §§ 5746, 5747), he may interrupt such use and prevent the injury complained of. *Hart v. Hildebrandt*, 30 Ind. App. 415 (66 N. E. Rep. 173). Where a public street, the fee to which is in the municipality, is devoted to a new use not inconsistent with the public travel upon it as a street, a court of equity will not entertain a bill by abutting property holders to enjoin such new use, except in cases where the complainant alleges and proves that he has sustained special and irreparable damages different in kind and character from those sustained by other property owners or the general public; nor is the right to such an injunction given by the fact that the municipal grant of such right is illegal. *McWethy v. Aurora Elec. Light & Power Co.*, 202 Ill. 218 (67 N. E. Rep. 9).

Sec. 600. Injunction to prevent water company from shutting off water in violation of its contract. A property owner who, in pursuance of a contract between him and a waterworks company, whereby it agreed to furnish him water for a term of years, at a fixed annual rental, in consideration

of his bearing the entire expense of piping the water from its mains and furnishing his residence with the necessary fixtures, may, after having fully complied with his part of the contract at a great expense, have an injunction against the company executing a threat to cut off his water supply unless he paid a greatly increased rental. *Edwards v. Milledgeville Water Co.*, 116 Ga. 201 (42 S. E. Rep. 417). The court say: "In *Horsky v. Water Co.*, 13 Mont. 229 (33 Pac. Rep. 689), the plaintiffs who were the owners of a large brewery, sought an injunction to prevent the defendant from shutting off water from the plaintiff's private pipe, which connected with the defendant's system of piping. The court held: 'An injunction will lie to enjoin a water company from breaking its contract to supply water to a brewery, when turning off the water would stop the brewing, destroy a large quantity of malt, and injure the brewers' trade.' Pemberton, J., in the opinion, said: 'We think the facts stated in the complaint, which are confessed by the demurrer, entitle the appellants to invoke the equity jurisdiction of the court, and to the negative and preventive relief of injunction.' In *Callery v. Waterworks Co.*, 35 La. Ann. 798, the court held: 'Where a contract is made with the city waterworks company to procure water from the pipes and fire plugs of the company for a stipulated price for the purpose of watering and sprinkling the streets, the party complying with his contract may prohibit the company and its officers and employees from any interference with his business under the contract, and from any act to hinder or disturb him in using or procuring the required quantity from the water pipes for the aforesaid purpose.' Todd, J., said: 'The plaintiff had the legal right to use the water from the pipes and fire plugs in his business in the manner and to the extent and for the purposes contemplated by the contract, and we can see no reason why he could not prevent the threatened invasion of his rights under such contract, and the stoppage of his water supply by an injunction. It was not, in our view, to compel the company to do an act, but to refrain from interference with or doing something to the prejudice of the plaintiff, and in contravention of a legal engagement.' In *Brown v. City of Frankfort*, (Ky.) 9 S. W. Rep. 384,—a case decided by court of appeals of Kentucky,—it was held: 'Where a city agrees, in consideration of the right of way granted, to allow the owner of land through which its water pipes are laid the free use at all times of two hydrants, a purchaser of its system of waterworks may be en-

joined from digging up the pipes connecting the hydrants with the source of supply.' Pryor, J., said: 'Brown is not asking that the city be compelled to keep the way in repair, or to furnish him with water as long as the corporation exists, but that the contract right of the parties remain as they were in the year 1883, when the right of way was granted. * * * The right to this water in the mode provided for by the contract may be of great value to the land; and when the party injured is not even asking any affirmative relief we perceive no reason why the city should not be compelled to let the pipes remain, or be prohibited from severing the connection by the removal of the pipes between Brown's land and the spring or reservoir.' *Sedalia Brewing Co. v. Sedalia Waterworks Co.*, 34 Mo. App. 50, was a proceeding in equity, brought by the plaintiff against the defendant to enjoin the latter from cutting off the supply of water from the former. It was held that injunction would lie; that the fact that under the contract 'continuous duties arise does not prevent the aid of an injunction; and this, too, although equity might not, in the given case, decree the specific performance of the contract.' In *Graves v. Gas Co.*, 83 Ia. 714 (50 N. W. Rep. 283), the court held that a gas company which had contracted with the owner of a dwelling to furnish him with gas, free of charge, for 20 years, and which had a monopoly, could be enjoined from wholly cutting off the supply. See, also, *Sewickly Borough School Dist. v. Ohio Val. Gas. Co.*, 154 Pa. 539 (25 Atl. Rep. 868), where a natural gas company was prevented by injunction from shutting off the supply of gas to a schoolhouse."

Sec. 601. Injunctions against trespass. Equity has jurisdiction to grant relief against repeated trespasses where the legal title has been established in the plaintiff. *Thomas v. Robinson*, Ia. (92 N. W. Rep. 70). Injunction may be granted against a trespass continuous in its nature, and the repetition of which is threatened, although the legal remedy would be adequate if each act stood alone. *Collition v. Oxborough*, 86 Minn. 361 (90 N. W. Rep. 793). Equity may enjoin the maintenance of a multiplicity of separate actions for trespass by the same plaintiff against a railroad, and compel their consolidation, where it appears that the liability in each depends upon whether the track had been properly constructed and that the injury was a constantly accruing one for which the plaintiff had maintained a previous action and intended to bring other actions in the

future. *Illinois Cent. R. Co. v. Garrison*, 81 Miss. 257 (32 So. Rep. 996; 95 Am. St. Rep. 469). Construing and applying Mo. Rev. Stat. 1899, § 3649, giving a remedy by injunction where "an irreparable injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages," it is held that keeping men on watch for the purpose of entering certain premises and excluding the rightful owner therefrom, and the actual entering of the men on the premises from time to time, and finally the causing of the arrest of the owner's servants in charge, constituted such continuous trespass as to warrant injunction, though the trespasser was solvent to answer in damages. *Metropolitan Land Co. v. Manning*, 98 Mo. App. 248 (71 S. W. Rep. 696). Injunction will not lie against a trespasser sinking a mining shaft on a 40-acre tract of land used for manufacturing brick, and the throwing of debris therefrom upon the surface. *King v. Mullins*, 27 Mont. 364 (71 Pac. Rep. 155.) Injunction will not be granted against a threatened trespass, except when necessary to prevent great or irreparable damage or mischief; and the complaint must allege the facts constituting such threatened damage, as a bare averment to that effect is not of itself sufficient. *Wabash R. Co. v. Englemen*, 160 Ind. 329 (66 N. E. Rep. 892). Fla. Rev. Stat., § 1469 construed and applied—injunction against trespass on timbered lands. *Louisville & N. R. Co. v. Gibson*, 43 Fla. 315 (31 So. Rep. 230).

Sec. 602. Appointment of receiver. Where, in case of recovery by a plaintiff in ejectment, he is entitled to recover rents and profits, a receiver may be appointed to preserve them, the defendant being shown to be insolvent. *Hereford v. Hereford*, 134 Ala. 321 (32 So. Rep. 651). Where a receiver for all the property of a defendant is appointed by a court in a suit against him in one county, the appointment of the same party as a receiver of the same defendant by a court of coordinate jurisdiction in another county, in a suit between the same parties, is erroneous, and cannot be justified as an extension of the same receivership. *Frenald v. Spokane & B. C. Telephone & Telegraph Co.*, 31 Wash 219 (71 Pac. Rep. 731). One who procures the appointment of a receiver without sufficient grounds, properly may be charged with the expenses of the receivership; and when the court has control of a fund or

property in which such applicant has an interest it may be charged with such expenses. *Horn v. Bohn*, 96 Md. 8 (53 Atl.Rep.576). The lien of a mortgage held by a stranger to a suit in which a receiver is appointed to wind up the affairs of a partnership, against the individual interest in real estate of one member of the partnership, remains upon the property, notwithstanding it has been sold by the receiver. *McLaughlin v. Taylor*, 115 Ga. 671 (42 S. E. Rep. 30). A statute (Ala. Code, § 803) authorizing a suit against receiver, without first obtaining leave of court, in respect to any act or transaction of his in carrying on the business connected with the property intrusted to him, does not authorize the beginning of an action of ejectment by a mortgagor against the lessee of a receiver duly appointed to take charge of and lease the mortgaged premises, without first obtaining consent of the court appointing him. *Baker v. Carraway*, 133 Ala. 502 (31 So. Rep. 933). An order directing a receiver to take possession of property of which no one is in possession does not of itself invest him with the possession; he must actually possess himself of it. *Metcalf v. Commonwealth Land & Lum. Co.'s Receiver*, Ky. (68 S. W. Rep. 1100; 24 Ky. Law Rep. 527). For particular case as to allowance of attorney's fees to a receiver, see *Stevens v. Hadfield*, 196 Ill. 253 (63 N. E. Rep. 633). For review of Tennessee cases on appointment of receiver to take charge of land pending litigation concerning it, see *Troughber v. Akin*, 109 Tenn. 451 (73 S. W. Rep. 118).

Sec. 603. New trial of right. Ia. Code, § 4205 construed and applied—new trial of right—date from which time runs—application and notice—discretion of court. *Bevering v. Smith*, Ia. (90 N. W. Rep. 840). N. C. Code Civ. Proc., § 98 construed and applied—second trial on payment of costs—particular payment held to satisfy the statute. *Mitchell v. Barrs*, 64 S. C. 197 (41 S. E. Rep. 962). Wis. Rev. Stat. 1898, § 3092 construed and applied—new trial of right in action of ejectment—bond—justification of sureties. *Newland v. Morris*, 113 Wis. 394 (89 N. W. Rep. 179). The fact that an equitable defense in the form of a counterclaim for specific performance is presented by a defendant in an action of ejectment does not deprive him of a right to a new trial under this section. *Newland v. Morris*, 115 Wis. 207 (91 N. W. Rep. 664). See opinion as to requisites of bond.

Sec. 604. Parties to real actions. Where it appears that a husband is *prima facie* vested with title to the curtesy initiate in real estate conveyed to his wife, he is a necessary party defendant to an action to cancel the deed on account of it having been procured by fraud. *Gorman v. McHale*, 24 R. I. 257 (52 Atl. Rep. 1083). In New Jersey it is held that the power of a husband to prevent his wife conveying her lands by refusing to join in her deed makes him a proper party defendant to an action brought by the wife to protect her lands, *Bristol v. Skerry*, 64 N. J. Eq. 624 (54 Atl. Rep. 135); or an action to set aside a deed to her, *Decker v. Panz*, N. J. Eq. (54 Atl. Rep. 137). Construing and applying Wis. Rev. Stat. 1898, §§ 2602-2604, it is held that riparian owners on a lake claiming a prescriptive right to have the artificial level of such lake created by a dam maintained, are necessary defendants to a suit for the abatement of the dam. *Castle v. City of Madison*, 113 Wis. 346 (89 N. W. Rep. 156).

Sec. 605. Pleading and practice in real actions—Miscellaneous notes. A general allegation of ownership of land authorizes proof of title by adverse possession. *McArthur v. Clark*, 86 Minn. 165 (90 N. W. Rep. 369; 91 Am. St. Rep. 333). Under Wis. Rev. Stat. 1898, § 2647, an action against a vendor for breach of his covenant of seisin may be joined with an action against him for false representations in the sale of the property. *Koepke v. Winterfield*, 116 Wis. 44 (92 N. W. Rep. 437). A joint action cannot be maintained by a husband and wife to recover damages accruing to each of them by reason of an unlawful entry by another upon premises occupied by them as joint lessees, the damages sought to be recovered by her being for nervous shock disabling her from prosecuting her business as dressmaker, and the husband seeking to recover for his loss of time in nursing his wife, and money expended for medical attention, etc. *Stewart v. Alvis*, 30 Ind. App. 237 (65 N. E. Rep. 937).

REAL ESTATE AGENT.

EPITOME OF CASES.

Sec. 606. Employment of agent—Statute requiring written authority. The employment may be made by parol. *Abbott v. Hunt*, 129 N. C. 403 (40 S. E. Rep. 119); *Lamb v. Baxter*, 130 N. C. 67 (40 S. E. Rep. 850). An executor empowered to sell real estate may employ a broker to sell it for him, and where such broker procures a purchaser to whom a sale, is made, he may have an action against the executor for his commission. *Ingham v. Ryan*, Colo. App. (71 Pac. Rep. 899) The provisions of Mont. Civ. Code, §§ 2185, 3085, and Code Civ. Proc., § 3276, requiring written authority to authorize an agent to make an agreement for the sale of land, went into force July 1, 1895, and prior to that time written authority was not necessary to the validity of an agent's contract of sale; but such agency might have been established by direct oral evidence of the appointment, or by inference from the acts, letters, or conduct of the parties, or from their relations, the one to the other, or from all combined; in short, from any evidence legitimately raising the inference of agency. *Cobban v. Hecklen*, 27 Mont. 245 (70 Pac. Rep. 805). In support of the last statement the court cite: *Fry*, Spec. Perf. (3d Am. Ed.) § 509, and cases there cited; *Coles v. Trecothick*, 9 Ves. 250; *Johnson v. Dodge*, 17 Ill. 433; *McWhorter v. McMahan*, 10 Paige, 386; *Rutenberg v. Main*, 47 Cal. 219; *Worrall v. Munn*, 5 N. Y. 243 (55 Am. Dec. 330); *Dykers v. Townsend*, 24 N. Y. 57; *Moody v. Smith*, 70 N. Y. 599; 1 Reed, St. Frauds, § 379, and cases there cited.

Sec. 607. Authority of agent—Liability of rental agent as to repairs. Authority given an agent to sell land can not be delegated by him to another. *Floyd v. Mackey*, 112 Ky. 646 (66 S. W. Rep. 518; 23 Ky. Law Rep. 2030); *Bromley v. Aday*, 70 Ark. 351 (68 S. W. Rep. 32). A mere general offer made by an owner of land to a real estate broker to sell it at

a specified price does not give the broker any further authority than to produce a buyer. *Balkema v. Searle*, 116 Ia. 374 (89 N. W. Rep. 1087). Authority to collect rent for a landlord is not evidence of authority to make contracts of renting for him. *Deickman v. Weirich*, (Ky.) 73 S. W. Rep. 1119 (24 Ky. Law Rep. 2340). An exclusive right given by a broker for 60 days to sell certain property at a fixed price contemplates a sale for cash, and does not authorize him to bind his principal by a contract of sale the time for the completion of which by the payment of the purchase price was fixed 30 days after the expiration of the 60 days. *Smith v. McCann*, 205 Pa. St. 57 (54 Atl. Rep. 498). A rental agent, although he has general control of the premises of his principal, is not charged with the duty of making repairs so as to render him liable for injury to a tenant to whom he has leased the property, resulting from the want of proper repairs. *Drake v. Hagan*, 108 Tenn. 265 (67 S. W. Rep. 470).

Sec. 608. Power of agent to bind principal by contract of sale. The fact that a principal gives his agent a signed memorandum containing a description of the land and his price is not sufficient to authorize the agent to bind him by executing a written contract of sale. *Donnan v. Adams*, 30 Tex. Civ. App. 615 (71 S. W. Rep. 580). An instrument by which an owner of real estate "grants" to a broker "the sale" of the same for a stated period, at a certain price and on specified terms, does not authorize such broker to sign his principal's name to a contract of sale of the land. *Brandrup v. Britten*, 11 N. Dak. 376 (92 N. W. Rep. 453). The court say: "It is well settled that the agency of such persons is limited to finding purchasers who are acceptable to vendors, or who are prepared to comply with the conditions of sale proposed by the vendors to their brokers, and, in the absence of express authority, does not extend to signing contracts of sale or conveyances in behalf of their principal. That was the conclusion reached by this court, after a careful review of the authorities, in the case of *Ballou v. Bergsvendsen*, 9 N. Dak. 285 (83 N. W. Rep. 10), in which this question was directly involved. We quote the following from the opinion in that case: 'It is well settled that their authority does not extend to binding their principals by contracts of sale, but merely to procuring purchasers for the property listed with them, who will be acceptable to the owners. *Coleman v. Garrigues*, 18 Barb. 60; *Glentworth v. Luther*, 21

Barb. 145; *Morris v. Ruddy*, 20 N. J. Eq. 236; *Duffy v. Hobson*, 40 Cal. 240 (6 Am. Rep. 617); *Armstrong v. Lowe*, 76 Cal. 616 (18 Pac. Rep. 758); *Siebold v. Davis*, 67 Ia. 560 (25 N. W. Rep. 778); *Stewart v. Pickering*, 73 Ia. 652 (35 N. W. Rep. 690). In *Halsey v. Monteiro*, 92 Va. 581 (24 S. E. Rep. 258), the court said: "A real estate broker or agent is defined to be one who negotiates the sale of real property. His business generally is only to find a purchaser who is willing to buy the land upon the terms fixed by the owner. He has no authority to bind his principal by signing a contract of sale. A sale of real estate involves many things besides fixing the price. The delivery of the possession has to be settled; generally, the title to be examined; and the conveyance, with its covenants, to be agreed upon and executed by the owner,—all of which require conference and time for their completion. They are for the determination of the owner, and do not pertain to the duties, and are not within the authority of a real estate agent. For obvious reasons, therefore, the law wisely withholds from him any implied authority to sign a contract of sale on behalf of his principal." See, also, *Holmes v. Redhead*, 104 Ia. 399 (73 N. W. Rep. 878); *Everman v. Herndon*, 71 Miss. 823 (15 So. Rep. 135). A real estate broker may be given authority to execute contracts for his principal, but it is an additional authority. The instrument under consideration does not confer any such additional authority. It merely 'grants' to the real estate broker 'the sale' or the selling of the land for a limited period, and, for the guidance of such brokers, it states the total net sum which the principal will accept, and the amount of cash payment which he will exact in case of a sale. As will be seen by an examination of the instrument, the details essential to the consummation of a sale are omitted. It does not provide the length of time the deferred payments are to run, or how they are to be divided, or as to the rate of interest to be charged, or as to whether a deed is to be given to the purchaser, and a mortgage to secure the deferred payments, or as to whether any deed shall be executed prior to full payment of the purchase price. These omissions tend strongly to show that it was the intention of the parties to the instrument that the sale was to be approved, and the contract of sale executed, by the principal, and not by the brokers. And such, as we have seen, was the construction placed upon it by the plaintiff and the brokers in conducting the negotiations with the defendant on the Sunday preceding the execution of the

contract. The fact that the writing grants 'the sale' of the premises to Meis & Orcutt does not mean that they had authority to sign contracts of sale. It has been held in numerous cases, where express authority was given to real estate brokers 'to sell' real estate, that the language did not authorize them to execute contracts or conveyances. Such was the holding in *Duffy v. Hobson*, 40 Cal. 240 (6 Am. Rep. 617), in which one Atkins, who had authority to sell his principal's real estate, had signed a contract of sale to one Duffy in behalf of Hobson, his principal. In that case the court said: 'We are of opinion that the authority given to Atkins to sell the property was not sufficient to authorize him to execute a contract of sale to Duffy in the name of Hobson, or to sign the name of the latter to any contract of sale. We think that it was no more than a mere authority from Hobson to find him a purchaser at the price of \$2000. This is the settled construction put upon the employment by professional brokers "to sell" or "to close a bargain" concerning real estate, and we know of no reason why the same language employed to express the authority of any other agent "to sell" should have a more extended meaning. Besides, a sale of real estate involves the adjustment of many matters in addition to fixing the price at which the property is to be sold. The deed of conveyance may be one with full covenants of seisin and warranty, or only those covenants imported by the use of the words "grant, bargain and sell" under our statute, or it may be by quitclaim merely. The vendor may be unwilling to deal with a particular proposed purchaser on any terms. He may consider him pecuniarily unable to comply with the contract, even if the title prove satisfactory; and he may decline to bind himself to convey to such a purchaser at the end of the time necessary to examine the title, because he might thereby in the meantime lose an opportunity to sell to some other person who might desire to purchase, and in whose good faith and ability to pay he reposed entire confidence. All these and many other like considerations might, and usually do, arise in the mind of the vendor. Now, a mere authority "to sell" can hardly confer power upon the agent to determine all these matters for his principal, so as to bind him by his determination. And yet, unless the agent do have such power, he cannot make a definite contract, or one that could be said to have the certainty requisite to deprive the principal of his option to ultimately decline to make the sale. To give to the mere words "to sell" such a broad signification as that would be to invest

the agent with powers of that ample and discretionary character usually only conferred with caution, and by means of a general letter of attorney, where the terms are distinctly expressed.' In *Armstrong v. Lowe*, 76 Cal. 616 (18 Pac. Rep. 758), Cook & Henderson, real estate brokers, had signed a contract of sale for their principal, pursuant to the following written authority: 'Cook & Henderson, real estate agents: You are hereby authorized to sell my property, and receive deposits on same, situate in * * * county of San Luis Obispo, * * * for \$200 per acre, cash.' The court said: 'The sole question in this case is whether the real estate broker whom the defendant employed "to sell" certain real property had authority to execute a contract to convey. We think that, upon the authority of *Duffy v. Hobson*, 40 Cal. 240-245 (6 Am. Rep. 617), it must be held that they had not.' *Grant v. Ede*, 85 Cal. 418 (24 Pac. Rep. 890; 20 Am. St. Rep. 237), is to the same effect. The rule is the same in New Jersey. In that state an agent may be authorized by parol to enter into a written contract which will bind his principal to convey real estate. It is held, however, that authority to sell, without more, will not authorize the agent to sign a written contract for his principal. In *Milne v. Kleb*, 44 N. J. Eq. 378 (14 Atl. Rep. 646), the court said: 'Authority to make or sign a written contract is not conferred, where the thing to be sold is land, by giving an agent power, by parol, to sell. Chancellor Zabriskie, in *Morris v. Ruddy*, 20 N. J. Eq. 236, 238, said, following the rule adopted by the courts of New York, that "giving authority to sell does not, by force of the terms, or by their general acceptance, give authority to sign the vendor's name to a contract. And in the case of lands it is not wise to extend their meaning by construction." Mr. Justice Brown had previously, in *Hedden v. Shepherd*, 29 N. J. L. 334, 345, said substantially the same thing. Both of these cases are cited with apparent approval by Mr. Justice Magie in pronouncing the opinion of the court of errors and appeals in *Young v. Hughes*, 32 N. J. Eq. 372, 383.'"

Sec. 609. Revocation of agent's authority. After a broker has been given a reasonable time to find a purchaser the principal may revoke his authority without incurring any liability. *Collier v. Johnson*, (Ky.) 67 S. W. Rep. 830 (23 Ky. Law Rep. 2453). The principal's execution and recording of a deed to land previously placed by him in the hands of an

agent for sale is notice to the agent and all persons dealing with him of the revocation of his authority, where a statute (Sayles' Tex. Civ. Stat., art. 4652) makes the record of a deed notice to all persons of its existence. *Bennett v. Featherstone*, 110 Tenn. 27 (71 S. W. Rep. 589).

A parol agency given a broker to sell real estate if he can secure a price therefor which will net him a certain sum, may be revoked at the will of his principal. *Abbott v. Hunt*, 129 N. C. 403 (40 S. E. Rep. 119). The court say: "Hartley's Appeal, 53 Pa. 212 (91 Am. Dec. 207), holds that a power of attorney by which the attorney is to receive as compensation 'one-half the net proceeds' is not a power coupled with an interest, and is revocable. This case cites a very clear enunciation of the same principle by Marshall, C. J., in *Hunt v. Rousmanier*, 8 Wheat, 174 (5 L. Ed. 589), which is also cited by this court, as to agencies to solicit insurance, in *Insurance Co. v. Williams* 91 N. C. 69 (49 Am. Rep. 637). In *Brookshire v. Vonnannon*, 28 N. C. 231, it is held that a power of attorney is revocable 'at any moment before the actual execution of it.' To same purport, *Machine Co. v. Ewing*, 141 U. S. 627 (12 Sup. Ct. Rep. 94; 35 L. Ed. 882); *Mansfield v. Mansfield*, 6 Conn. 559 (16 Am. Dec. 73); *Mechem, Ag.* §§ 204-210; *Hall v. Gambrill*, (C. C.) 88 Fed. Rep. 709. In *Sibbald v. Iron Co.*, 83 N. Y. 378 (38 Am. Rep. 441), it is said: 'Where no time is fixed for the continuance of a contract between broker and principal, either party can terminate it at will, subject only to the ordinary requirements of good faith.' A case on all fours is *Coffin v. Landis*, 46 Pa. 426, which holds (page 434): 'where one, as agent for another, contracts to sell the land of the latter in consideration of one-half of the net proceeds of the sale, and there is no stipulation in the contract as to the duration of the employment, the principal has a right to terminate it at any time, and to discharge the agent from his service without notice; and the plaintiff (agent) cannot recover for any services rendered or for his loss of employment after his discharge.' And almost as directly in point are the recent cases of *Young v. Trainor*, (1895) 158 Ill. 428 (42 N. E. Rep. 139), which holds that a 'real estate broker who produces a customer after his principal had withdrawn his offer to sell is not entitled to a commission,' and *Bailey v. Smith*, (1894) 103 Ala. 641 (15 So. Rep. 900). which is to the same effect, and *Malonee v. Young*, 119 N. C. 549 (26 S. E. Rep. 141)."

Sec. 610. Duties and liabilities of agent to his principal

—Trust relation. It is the duty of one acting for another in the sale of real estate, whether for compensation or otherwise, to faithfully and truthfully make known to his principal all matters pertaining to the transaction, and if he violates this duty and fraudulently misrepresents the facts concerning his transactions, and undertakes to derive an advantage therefrom to himself, he forfeits any compensation that would otherwise be due him, and all gain thereby belongs to his principal. *Jeffries v. Robbins*, 66 Kan. 427 (71 Pac. Rep. 852). Citing, *Hampton v. Lackens*, 72 Ill. App. 442; *Cottom v. Holliday*, 59 Ill. 177; *Farnsworth v. Hemmer*, 1 Allen, 494 (79 Am. Dec. 756); *Rice v. Wood*, 113 Mass. 133 (18 Am. Rep. 459); *Holcomb v. Weaver* 136 Mass. 265; *Walker v. Osgood*, 98 Mass. 348 (93 Am. Dec. 168); *Fuller v. Dame*, 18 Pick. 472; *Bollman v. Loomis*, 41 Conn. 581; *Atlee v. Fink*, 75 Mo. 100 (43 Am. Rep. 385); *Collins et al. v. McClurg*, 1 Colo. App. 348 (29 Pac. Rep. 299). If the agent is himself the purchaser, using a third party as a medium through whom to secure a deed to the premises from the owner, and then sell at an advance, he will be held accountable to the owner for the profit realized. *Merriam v. Johnson*, 86 Minn. 61 (90 N. W. Rep. 116). A promotor of a corporation organized to buy land will not be allowed to make a profit out of the transaction through an agreement to divide profits with a broker having the land for sale. *Tegarden Bros. v. Big Star Zinc Co.*, Ark. (72 S. W. Rep. 989). An agent who is authorized by his principal to sell or exchange the property of the latter upon specified prices and terms is in duty bound, upon learning that a more advantageous sale or exchange can be made, the facts concerning which are unknown to the principal, to communicate the same to him before making the sale as expressly authorized, and his failure to do so amounts to a fraud in law. *Holmes v. Cathcart*, 88 Minn. 213 (92 N. W. Rep. 956). An agent having a contract to sell his principal's property at a fixed price, all obtained above that to be his commission, who with knowledge that he can sell the property at an advance, and without disclosing this to the principal induces him to reduce his price and make the memorandum of sale to the agent, will be held to account to his principal for the amount of such reduction, upon his effecting a sale at an advance in price exceeding such reduction. *Ballinger v. Wilson*, N. J. Eq. (53 Atl. Rep. 488).

Sec. 611. Recovery of commission—General principles and particular cases. A principal who has accepted an offer to purchase his land as satisfactory to him cannot avail himself of an indefiniteness in the description to defeat his broker's right to commission. *Monk v. Parker*, 180 Mass. 246 (63 N. E. Rep. 793). Procuring one who takes merely an option contract to purchase does not entitle the broker to any commission. *Arthur D. Jones & Co. v. Eilenfeldt*, 28 Wash 687 (69 Pac. Rep. 368). A broker effecting an exchange of property may recover commissions from both parties where they understand that both are to be charged commission and agree to pay it. *Lamb v. Baxter*, 130 N. C. 67 (40 S. E. Rep. 850). Where a contract for the exchange of property results from negotiations brought about by a broker, the fact that the exchange was made without his knowledge does not defeat his right to a commission. *French v. McKay*, 181 Mass. 485 (63 N. E. Rep. 1068). A purchaser procured by a broker, who refuses to carry out his contract on account of which the latter loses his right to recover his commission from the vendor, may be held liable in damages to the broker for the amount of his commission. *Livermore v. Crane*, 26 Wash. 529 (67 Pac. Rep. 221; 57 L. R. A. 401). Citing, *Cavender v. Waddingham*, 2 Mo. App. 551; *Atkinson v. Pack*, 114 N. C. 697 (19 S. E. Rep. 628). Where a real estate broker is employed by the owner of lands to exchange the same for other property, and a third person, having information thereof from the broker, communicates through him with the owner of the land, and effects a sale, the relation of principal and agent between the broker and the owner forbids any legal inference that there is an implied promise by such third party, based upon benefits from the trade, to pay the broker a commission. *Dartt v. Sonnesyn*, 86 Minn. 55 (90 N. W. Rep. 115). A broker with whom property is listed for sale at a fixed price under a contract with his principal to pay him a certain percentage of the price "in case he furnished a purchaser for said property," is entitled to recover from his principal such percentage where he has negotiated a contract between his principal and the owner of other property whereby such principal agrees to exchange his property for the other property, the value of which he accepts as equal to the value of his property. *Rabb v. Johnson*, 28 Ind. App. 665 (63 N. E. Rep. 580). A seller can not avoid liability to an agent for commission for the sale of property consisting of real estate, brick works, contracts for doing street paving, tools

and appliances for such work, contracts for the purchase of material, and for the use of certain processes for paving streets, on the ground that the contract was not carried out because the purchaser demanded that it be indemnified against the result of certain injunction suits relating to the paving contracts of which it had no notice at the time the contract was entered into. *Indiana Bermudez Asphalt Co. v. Robinson*, 29 Ind. App. 59 (63 N. E. Rep. 797). The right of a broker, who finds a purchaser who is willing to buy on terms satisfactory to his principal, to recover his commission is not affected by the fact that his principal was not the owner of the land and was unable to procure the same so as to avail himself of the offer, where such broker was ignorant of his principal's relation to the land. *Monk v. Parker*, 180 Mass. 246 (63 N. E. Rep. 793). Where an agent employed to sell property finds a customer with whom his principal enters into a contract of sale, he is entitled to his commission, in the absence of an agreement to the contrary, although the contract was not specifically enforceable and was afterward cancelled by the parties. *Mattes v. Engel*, 15 S. Dak. 330 (89 N. W. Rep. 651). A broker employed by the owner of an interest in a mine to negotiate a sale of such interest, for which it was agreed that he should have a certain commission, who secures a purchaser who takes an option on such interest for a certain period, during which the owner died and afterward his deed, on failure of the purchaser to make payment, was returned to his administrator, can not recover his commission on account of such purchaser subsequently purchasing the interest from the administrator at the same price, but on different terms. *Trickey v. Crowe*, Ariz. (71 Pac. Rep. 965). For cases depending upon particular facts illustrating when a real estate agent will be entitled to recover a commission, see *Gregory v. Bonney*, 135 Cal. 589 (67 Pac. Rep. 1038); *Seabury v. Fidelity Ins., Trust & Safe Dep. Co.*, 205 Pa. St. 234 (54 Atl. Rep. 898); *Barton v. Powers*, 182 Mass. 467 (65 N. E. Rep. 826); *Drake v. Biddinger*, 30 Ind. 357 (66 N. E. Rep. 56); *Rounds v. Allee*, 116 Ia. 345 (89 N. W. Rep. 1098); *Scott v. Gage*, S. Dak. (92 N. W. Rep. 37); *Clark v. Dayton*, 87 Minn. 454 (92 N. W. Rep. 327); *Collier v. Johnson*, (Ky.) 67 S. W. Rep. 830 (23 Ky. Law Rep. 830).

Sec. 612. Recovery of commission—Sale by owner.
A broker employed to negotiate a sale of real estate who pro-

cures a purchaser ready and able to purchase upon terms satisfactory to the principal can not be deprived of his commission by the latter taking the proceedings out of the hands of the broker and completing the sale himself. *Gresham v. Connelly*, 114 Ga. 906 (41 S. E. Rep. 42). Although an agreement signed by a real estate owner to pay an agent certain commission in the event that he should himself make a sale is a unilateral contract, and invalid upon its face, yet it may be accepted by the agent's partial performance thereof, and thereby become enforceable. *Lapham v. Flint*, 86 Minn. 376 (90 N. W. Rep. 780). Where negotiations by the broker with one who contemplates buying result in a definite proposition to the owner, who rejects the same, there being no agreement by which he is bound to accept it, and such negotiations are then abandoned voluntarily, the fact that the intending purchaser subsequently, and after the authority of the broker has terminated, buys the property direct from the owner, does not render such owner liable to the broker for a commission; there being no fraud in the conduct of the owner in rejecting the proposition made through his efforts. *Fairchild v. Cunningham*, 84 Minn. 521 (88 N. W. Rep. 15). When a broker with whom land is listed for sale has authority to sell it only as a whole has negotiations with a purchaser for such a sale which are terminated, he is not entitled to a commission on account of a sale of a part of the premises subsequently made by the owner to the same purchaser. *Frenzer v. Lee*, (Neb.) 90 N. W. Rep. 914.

Sec. 613. Recovery of commission—Agent to procure a loan. A broker employed to procure a loan is entitled to his commission where he procures a party ready and willing to make the loan to his principal on terms acceptable and accepted by him, where the loan fails of consummation on account of a defect in the principal's title. *Clark v. H. G. Thompson Co.* 75 Conn. 161 (52 Atl. Rep. 720). Where an agent, in pursuance of his employment by one as executor, who represents that he is authorized to procure a loan and mortgage certain property to secure it, produces a party able and willing to make the loan, but who declines to do so on account of the executor's want of authority to make a mortgage, he is entitled to his commission. *Fullerton v. Carpenter*, 97 Mo. App. 197 (71 S. W. Rep. 98). If two persons enter into a written contract wherein it is stipulated that one is to procure a loan of a certain amount of money for the other, and the latter agrees

to pay a named amount as commission for the services of the former, and no time is fixed in the contract for the procurement of the money, the law will construe the contract to mean that the loan is to be procured within a reasonable time. If, shortly after the contract is executed, the broker notifies the borrower that he will be ready to furnish the money at a certain hour, and the borrower appears at the time and place designated, but finds that the broker, on account of not having the papers fully prepared, is not quite ready to close the transaction, the borrower can not, for that reason, withdraw from his agreement, and thereby deprive the broker of his commission, where the latter in fact was ready and offered to perform later on the same day, and within a reasonable time from the execution of the contract. *Collier v. Weyman*, 114 Ga. 944 (41 S. E. Rep. 50). For particular facts held to entitle a broker to a commission as the procuring cause of a loan, see *Williams v. Cowles*, 75 Conn. 155 (52 Atl. Rep. 820).

Sec. 614. Action to recover commission—Complaint—Measure of recovery. A complaint by a broker to recover a commission alleging that the defendant employed him to sell real estate under an agreement to pay him \$100 if he found a purchaser; that he sold the land and the defendant executed a deed to the purchaser and received the purchase price, is good on demurrer. *Adams v. McLaughlin*, 159 Ind. 23 (64 N. E. Rep. 462). Where, in an action by a real estate broker to recover commission for effecting an exchange of real estate, the jury asks the court for information as to the amount of his recovery, it is error for the court to tell them that they are not bound by any rule, as in the absence of a contract the broker is entitled to the customary commission in such cases, and if this standard is not established by the evidence, a fair and reasonable compensation. *Hartman v. Warner*, 75 Conn. 197 (52 Atl. Rep. 719). Where lands in the hands of a broker for sale at a certain price per acre are sold by the owner at a price in excess of that to a purchaser who had made the same offer to the broker, he is not entitled to recover such excess as his commission, but simply a reasonable compensation for services. *Boysen v. Robertson*, 70 Ark. 56 (68 S. W. Rep. 243). For particular cases determining questions as to admissibility of evidence and applicability of instructions in an action by a broker for commissions, see *Carnes v. Howard*, 180 Mass. 569 (63 N. E. Rep. 122); *Adams v. McLaughlin*, 159 Ind. 23 (64

N. E. Rep. 462); Jennings v. Rooney, 183 Mass. 577 (67 N. E. Rep. 665); Davies v. Thomas, 87 Minn. 301 (91 N. W. Rep. 1100); Rutherford v. Simpson, 87 Minn. 495 (92 N. W. Rep. 413).

RECORDS AND RECORDING.

EPITOME OF CASES.

Sec. 615. Endorsement of names as parties to a deed on the back thereof as a part of the deed—Effect of filing for record of a deed so endorsed with names of persons not in fact parties to the instrument. The endorsement on the back of a deed of the names of the parties to it, so made as to indicate which is grantor and which is grantee, as "A. B. to C. D.," is no part of the deed, nor effectual for any purpose; and the filing for record of a deed upon which is so endorsed the names of persons as grantor and grantee, or either, who are not parties to the instrument, is not constructive notice of a conveyance between or from or to the persons or person whose names or name are thus written on its back, but is constructive notice of a conveyance between the parties to the paper as they appear in the deed itself. Gibson v. Clark, 132 Ala. 370 (331 So. Rep. 472).

Sec. 616. What instruments may be recorded—Place of recording. An assignment of a mortgage is such an instrument as is required to be recorded by the statutes of Nebraska. Ames v. Miller, Neb. (91 N. W. Rep. 250). Construing and applying Mich. Comp. Laws, §§ 8988, 8994, 9511, it is held that an assignment of a lease of real estate having eight or ten years to run is such a conveyance of an interest in lands as to make the real estate recording laws applicable to it. Crouse v. Mitchell, 130 Mich. 347 (90 N. W. Rep. 32). The assignment of an unrecorded contract for the sale of land is not such an instrument as is required to be recorded. Early Times Distillery Co. v. Zeiger, N. Mex. (67 Pac. Rep. 734). The recording of an unproved copy of a lost deed does not give constructive notice. Cunningham v. Estill, (Ky.) 68 S. W. Rep. 1081 (24 Ky. Law Rep. 559). Where a notary's

certificate of acknowledgement of a deed is not authenticated by his seal the deed is not entitled to record. *Koch v. West*, 118 Ia. 468 (92 N. W. Rep. 663; 96 Am. St. Rep. 394). Applying Cal. Code Civ. Proc., § 179, limiting the territorial jurisdiction of a justice of the peace to take and certify acknowledgments to his county, it is held that where a justice's certificate of acknowledgment to an instrument shows on its face that he took the acknowledgment out of his county, the instrument is not entitled to record. *Middlecoff v. Hemstreet*, 135 Cal. 173 (67 Pac. Rep. 768). Construing and applying N. J. Laws 1898, p. 670, it is held that a mortgage of a 10-year leasehold, though executed a year prior to the enactment of the statute, comes within the provisions and is recordable as a mortgage affecting real estate, and in order to be good as against creditors it is not necessary that it be recorded as a chattel mortgage, under Gen. Stat., pp. 2113, 2114: *Lembeck & Betz Eagle Brewing Co. v. Kelly*, 63 N. J. Eq. 401 (51 Atl. Rep. 794). The assignment of purchase money notes secured by a lien arising out of the vendor's retention of title until their payment, must be recorded in order to preserve the assignee's right to the lien against subsequent purchasers and incumbrancers of the vendor, without notice of the assignee's rights. *First Nat. Bank v. Edgar*, Neb. (91 N. W. Rep. 404). Ky. Stat., § 495 allows a deed conveying land lying partly in two or more counties to be recorded in that county in which the greater part lies, and makes such record full constructive notice. *Shively v. Gilpin*, (Ky.) 66 S. W. Rep. 763 (23 Ky. Law Rep. 2090).

Sec. 617. What constitutes recording—Filing with recording officer. Registry in the records of mortgages of personal property, of a mortgage covering both realty and personality is not constructive notice of the mortgage of real estate; nor does the leaving of such a mortgage in the recorder's office for record constitute such notice, unless it was left there to be recorded as a real estate mortgage. *Hunt v. Allen*, 73 Vt. 322 (50 Atl. Rep. 1103). The unsigned indorsement of a deed by the proper recording officer with his usual stamp for that purpose, showing that the same had been "Filed" for record on a day stated in the indorsement, and placing it in the usual place in his office for papers of that character, is such a delivery for recording under the statute of Alabama as to make the deed operative as a record from that day. *Eufaula Nat. Bank*

v. Pruett, 128 Ala. 470 (30 So. Rep. 731). Applying N. J. Laws 1898, pp. 686, 687, §§ 41, 42, making it the duty of the register to provide certain books and record without delay instruments entitled to record under the statute, it is held that it is a matter of common knowledge that such instruments can not be, and are not, immediately recorded; and that a subsequent purchaser is charged with notice of a mortgage duly deposited for record though not actually recorded, nor entered on a private index of unrecorded instruments kept by the recording officer for his own convenience and the keeping of which is not required by law. *Von Schuller v. Commercial Inv. Bldg. & L. Ass'n*, 63 N. J. Eq. 388 (51 Atl. Rep. 932).

Sec. 618. Records as notice. Existing rights in real estate are not affected by the notice arising from the subsequent recording of instruments. *Dixon v. Smith*, 181 Mass. 218 (63 N. E. Rep. 419). Every person who takes a conveyance of an interest in real estate is conclusively presumed to know those facts which are apparent upon the land records concerning the chain of title of the property described in the conveyance; and takes subject thereto regardless of the representations of his grantor and his reliance thereon. *Beach v. Osborne*, 74 Conn. 405 (50 Atl. Rep. 1019). See opinion for discussion of this subject. The constructive notice given a subsequent creditor by the record of prior mortgages does not bar his right to impeach them as a fraud on subsequent creditors. *Baltimore High Grade Brick Co. v. Amos*, 95 Md. 571 (53 Atl. Rep. 148). Every purchaser of land takes title subject to any defects, reservations, and exceptions that are referred to in the deed by which he acquires title, or that may be ascertained by reference to his chain of title as spread forth upon the public record. *Mitchell v. D'Olier*, 68 N. J. L. 375 (53 Atl. Rep. 467; 59 L. R. A. 949). The record of a mortgage intended to embrace lots 13 and 14 in University Park, second addition to West Lafayette, which erroneously describes the lots as "lots 13 and 14 in University Park addition to West Lafayette," is not constructive notice to a subsequent mortgagee whose mortgage correctly describes the property. *Rinehardt v. Reifers*, 158 Ind. 675 (64 N. E. Rep. 459). Neither the record of a mortgage given by a stranger to the record title, nor the assessment of property in the name of one other than the record owner, or the recording of a certificate of levy of execution against land as the property of one not the record

owner under a judgment rendered in an action to which the record owner was not a party, constitute constructive notice to an intending purchaser, of a prior unrecorded deed. *Advance Thresher Co. v. Esteb*, 41 Or. 469 (69 Pac. Rep. 447). The record of a deed by one having the record title to an undivided one-seventh interest in a tract of land is not constructive notice to one subsequently purchasing the other six-sevenths from the record owners thereof, that the grantor therein held a prior unrecorded deed from them of such interests. *Scotch Lumber Co. v. Sage*, 132 Ala. 598 (32 So. Rep. 607; 90 Am. St. Rep. 932). The recording of a deed by the beneficiary in a trust deed which contained no words of conveyance and was inoperative to convey title, does not impart notice of the grantee's interest to a subsequent purchaser of the legal title. *Becker v. Stroher*, 167 Mo. 306 (66 S W Rep. 1083). The record of defective instruments recorded prior to Jan. 1, 1903, are declared to impart notice to purchasers after that date, by Laws 1903, p. 108.

Sec. 619. Records as notice—Instruments out of chain of title—Forged deed. No deed of conveyance nor instrument of writing of any kind not within the line of the chain of title will impart notice to a purchaser. A purchaser is not to be charged with constructive notice of a deed simply because it is upon record, but, in order that he may be charged with such notice, it must be within the line of the chain of title. *Becker v. Stroher*, 167 Mo. 306 (66 S. W. Rep. 1083). The record of a deed by one not connected of record with the grantor through whom title is claimed does not constitute constructive notice of unrecorded deeds connecting him with such title. *Tennessee Coal, Iron & R. Co. v. Gardner*, 131 Ala. 599 (32 So. Rep. 622). A purchaser is not bound to take notice of the record of a deed made by a grantee of the same grantor if the deed by which the grantee claims title is not on record so as to complete the chain of title. *Goosby v. Johnson*, (Ky.) 69 S. W. Rep. 697 (24 Ky. Law Rep. 610). Construing and applying Mo. Rev. Stat. 1899, §§ 924, 925, requiring a deed to be duly certified and recorded in order for it to be valid, except between the parties and those having actual notice thereof, it is held the record of a deed to which the name of one of the grantors and the acknowledgment were forged, imparts notice to no one, but is valid to convey the forger's interest in the land, as to all persons claiming under him, having actual notice of

such conveyance prior to acquiring rights under other conveyances. *Finley v. Babb*, 173 Mo. 257 (73 S. W. Rep. 180).

Sec. 620. Records as notice—Indexes. In Iowa a purchaser is not bound to look beyond the proper index for information as to conveyances, and, if the index shows none, there is no constructive notice of any. *Koch v. West*, 118 Ia. 468 (92 N. W. Rep. 663 96 Am. St. Rep. 394; see pp. 397-406 for exhaustive note on "The effect of the defective recording of legal instruments upon the rights of third persons). A judgment, abstracted by the initials of the Christian name, "E. G.," is sufficient notice to a purchaser from "Eleanor G." *Green v. Meyers*, 98 Mo. App. 438 (72 S. W. Rep. 128). The court say: "One who is interested in examining a record index for the name of 'Eleanor G.' as the Christian name of a certain surname and finds prefixed to such surname the initials 'E. G.,' will certainly have his attention arrested, and it would surely beget in him enough concern, if he be acting in good faith, to inquire further. So we say that the initials 'E. G.,' in the abstract of judgment in this case, were sufficient notice of the full name 'Eleanor G.' See case *Jones' Estate*, 27 Pa. 336; *Fisher v. Bush*, 133 Ind. 321 (32 N. E. Rep. 924); *Pinney v. Russell*, 52 Minn. 447 (54 N. W. Rep. 484); *Bank v. Kuhnle*, 50 Kan. 420 (31 Pac. Rep. 1057; 34 Am. St. Rep. 129)."

Sec. 621. Unrecorded instruments. As between several unrecorded conveyances, that of prior execution takes precedence. *Crouse v. Mitchell*, 130 Mich. 347 (90 N. W. Rep. 32). The holder of an unrecorded mortgage asserting its priority over a subsequent bona fide purchaser has the burden of proving that such purchaser had notice of the mortgage. *Walter v. Brown*, 115 Ia. 360 (88 N. W. Rep. 832). In Illinois, a creditor who has obtained a lien upon land by virtue of his judgment, and execution thereunder, occupies the same position with respect to prior unrecorded instruments of writing or conveyances as does a purchaser. *Gary v. Newton*, 201 Ill. 170 (66 N. E. Rep. 267). *Burns' Ind. Rev. Stat.*, § 3350, providing that every conveyance or mortgage of lands not recorded within 45 days after its execution shall be fraudulent as against any subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration, does not protect general creditors. *State Bank of Indiana v. Backus*, Ind.

App. (66 N. E. Rep. 475). Under Mich. Comp. Laws 1897, § 9224, from the time notice of the levy of an execution on realty is filed with the register of deeds, one claiming under it has priority over unrecorded instruments of which he had no notice. *Gardner v. Mason*, 130 Mich. 436 (90 N. W. Rep. 28). A prior grantee of one against whom an action for the specific performance of a contract to convey the same land is brought by a third person, although his deed is unrecorded, takes title as against the plaintiff in such action, as one who commences a suit against the holder of the legal title does not occupy the position of a purchaser, within the meaning of Ia. Code, § 2925, making unrecorded deeds void as against "subsequent purchasers." *Noyes v. Crawford*, 118 Ia. 15 (91 N. W. Rep. 799; 96 Am. St. Rep. 363).

Sec. 622. Unrecorded instruments and attaching creditors. Under Mass. Rev. Laws, ch. 127, § 4, an attachment of real estate made by one having no notice of a prior unrecorded deed takes precedence of the deed. *D'Arcy v. Mooshkin*, 183 Mass. 382 (67 N. E. Rep. 339). An unrecorded assignment of a title bond duly recorded, as required by Miss. Code, § 2459, is valid as against a subsequent attachment for the debts of the assignor, where there is no statute requiring the recording of such an assignment. *Macrae v. Goodbar*, 80 Miss. 315 (31 So. Rep. 812). An unrecorded deed or mortgage will have priority over the lien of an attachment, although the attaching creditor did not at the time of the attachment or levy have any notice of the unrecorded deed or mortgage. *Campbell v. Keys*, 130 Mich. 127 (89 N. W. Rep. 720). *Citing*, *Holden v. Garrett*, 23 Kan. 98; *Forwarding Co. v. Mahaffey*, 36 Kan. 152 (12 Pac. Rep. 705); *Wilcoxson v. Miller*, 49 Cal. 193; *Davis v. Owenby*, 14 Mo. 170 (55 Am. Dec. 105); *Hope v. Blair*, 105 Mo. 85 (16 S. W. Rep. 595; 24 Am. St. Rep. 366); *Norton v. Williams*, 9 Ia. 528; *Bell v. Evans*, 10 Ia. 353; *Vaughn v. Schamalsle*, 10 Mont. 186 (25 Pac. Rep. 102; 10 L. R. A. 411); *Runyan v. McClellan*, 24 Ind. 165; *Wright v. Jones*, 105 Ind. 17 (4 N. E. Rep. 281); *Greenleaf v. Edes*, 2 Minn. 264 (Gil. 226); *Schroeder v. Gurney*, 73 N. Y. 430; *Harral v. Gray*, 10 Neb. 186 (4 N. W. Rep. 1040).

TIME FOR RECORDING.

[In Vol. II, §§ 563-611; Vol. III, §§ 638-648; Vol. IV, §§ 717-722; Vol. V, §§ 746-759; Vol. VI, §§ 765-782; Vol. VII, §§ 680-685; Vol. VIII, §§ 695-711; Vol. IX, §§ 668-676, will be found a compilation of the statutory provisions of the several states and territories in reference to the time for recording deeds, etc. Below we note such amendments, changes and additional constructions as have been made.]

Sec. 623. Alabama.

(See Vol. II, § 563; Vol. III, § 638; Vol. V, § 746; Vol. VI, § 765; Vol. VII, § 680; Vol. VIII, § 695.) A purchaser at a judicial sale is protected by Code, § 1005, making a conveyance of real estate void as to subsequent purchasers for value unless recorded. *Tennessee Coal. Iron & R. Co. v. Gardner*, 131 Ala. 599 (32 So. Rep. 622).

Sec. 624. Arkansas.

(See Vol. II, § 565; Vol. IV, § 717.) Construing and applying *Sand & H. Dig.*, § 728, providing that no deed or other instrument affecting the title to real estate shall be valid as against a subsequent purchaser for value without notice until the same is duly filed for record, it is held that the absolute title rests with the grantor and his heirs, in abeyance, to vest irrevocably only upon the filing of a deed for record in the proper office; and, as between two grantees of the same grantor whose deeds are executed on the same day without either having notice of the other's deed, it is held that the one who first registers his deed in the county where the land lies acquires the superior title thereto. *Penrose v. Doherty*, 70 Ark. 256 (67 S. W. Rep. 398).

Sec. 625. Georgia.

(See Vol. II, § 572; Vol. VI, § 766; Vol. VIII, § 698.) Applying Civ. Code, §§ 2778, 3618, it is held that where, in 1890, one made a deed to land to one person, and subsequently made a deed to the same land to another person, who took it without notice of the former deed, and had it recorded prior to the record of the former deed, the second deed has priority over the first. *Lindley v. Frey*, 115 Ga. 662 (42 S. E. Rep. 79).

Sec. 626. Illinois.

(See Vol. II, § 574; Vol. V, § 749; Vol. VI, § 767; Vol. VII, § 682.) Judgment creditors are treated as purchasers in applying *Starr & C. Ann. Stat.* (2d Ed.), p. 944, providing that "all deeds and title papers shall be adjudged void as to all creditors and subsequent purchasers without notice until the same shall be filed for record." *Gary v. Newton* 201 Ill. 170 (66 N. E. Rep. 267).

Sec. 627. Indiana.

(See Vol. II, § 575; Vol. V, § 750; Vol. VI, § 768; Vol. IX, § 669.) Burns' Rev. Stat., § 3350, providing that every conveyance or mortgage of lands not recorded within 45 days after its execution shall be fraudulent and void as against any subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration, does not protect general creditors. *State Bank of Indiana v. Backus*, Ind. App. (66 N. E. Rep. 475).

Sec. 628. Michigan.

(See Vol. II, § 583; Vol. VII, § 686; Vol. VIII, § 699.) An assignment of a lease of real estate having ten years yet to run is a conveyance of real estate, within the meaning of Comp. Laws, § 8988, requiring such a conveyance to be recorded in order to be valid as against subsequent purchasers in good faith; and, under this statute, as between two unrecorded conveyances, the one first executed has priority. *Crouse v. Mitchell*, 130 Mich. 347 (90 N. W. Rep. 32).

Sec. 629. North Carolina.

(See Vol. II, § 594; Vol. III, § 644; Vol. IV, § 722; Vol. V, § 755; Vol. VI, § 774; Vol. VII, § 692; Vol. VIII, § 702; Vol. IX, § 674.) Construing and applying Code, § 1254, providing that "no deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainer or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lieth," it is held that where a mortgage subject to a deed of trust was registered prior to that instrument the title to the land vested in the mortgagee. *Commercial & Farmers' Bank v. Vass*, 130 N. C. 590 (41 S. E. Rep. 791). Laws 1885, ch. 147, repealing Code, § 1245, places no limitation on the time of registration, and under it a deed executed in 1868 may be recorded in 1896. *Hallyburton v. Slagle*, 130 N. C. 482 (41 S. E. Rep. 877).

Sec. 630. North Dakota.

(See Vol. V, § 756; Vol. VIII, § 703.) Section 3594, Rev. Codes, is amended so as to read: "Every conveyance by deed, mortgage or otherwise, of real estate within this state, shall be recorded in the office of the register of deeds of the county where such real estate is situated, and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any part or portion thereof, whose conveyance, whether in the form of a warranty deed, or deed of bargain and sale, deed of quitclaim and release, of the form in common use, or otherwise, is first duly recorded; or as against any attachment levied thereon, or any judgment lawfully obtained, at the suit of any party, against the

person in whose name the title to such land appears of record, prior to the recording of such conveyance. Every conveyance aforesaid heretofore executed, and not so recorded, and which shall not be so recorded within three months from the passage of this act, shall be void against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, claiming under or through a deed of quitclaim and release, of the form in common use, heretofore so recorded, or which may be recorded before such prior conveyance. The fact that such first recorded conveyance of such subsequent purchaser for a valuable consideration is in the form, or contains the terms, of a deed of quitclaim and release aforesaid, shall not affect the question of good faith of subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof; provided, however, that all deeds, mortgages, and other instruments affecting real estate, situated in any unorganized county, may be recorded in the county to which such unorganized county is attached for judicial purposes, and records of such instruments which have been or shall be so made, shall have the same effect as if recorded in a county where the premises are situated." Laws 1903, p. 202.

REDEMPTION.

EPITOME OF CASES.

Sec. 631. Equity of redemption—Purchase or extinguishment of. A conveyance by a mortgagor of his equity of redemption made to his mortgagee in consideration of the indebtedness secured is valid. *Glover v. Fitzpatrick*, Ind. Ter. (69 S. W. Rep. 856). The mortgagee may purchase from the mortgagor his right of redemption, for a fair consideration, if the transaction is untainted by any oppression or advantage taken by the mortgagee of the necessities of the mortgagor; but the fairness of such sales must be clearly established. *De Lancey v. Finnegan*, 86 Minn. 255 (90 N. W. Rep. 387). See opinion for particular sale held valid. A bona fide agreement may be made between the mortgagee and the mortgagor, by the terms of which the equity of redemption of the mortgagor may be extinguished, and the entire estate vested in the mortgagee; but such an agreement for the extinguishment of the equity of redemption will never be sustained unless the

transaction is fair, and unaccompanied by any oppression or fraud or undue influence, and the burden is on the mortgagee asserting such an agreement to show the fairness and honesty of the transaction. *Cassem v. Heustis*, 201 Ill. 208 (66 N. E. Rep. 283; 94 Am. St. Rep. 160).

Sec. 632. Who may make redemption. The whole of property owned by joint tenants in common may be redeemed by one tenant, but there can be no redemption of an undivided interest. *McQueen v. Whetstone*, 127 Ala. 417 (30 So. Rep. 548). In Indiana it is held that a surviving husband has no such interest in lands of his wife sold during her lifetime to pay a ditch assessment as entitles him to redeem them from such sale. *Turner v. Heinburg*, 30 Ind. App. 615 (65 N. E. Rep. 294). A vendor of real estate, who retains the legal title to secure the purchase-money notes, one of which he assigns without giving it priority over those retained, has no right to redeem from a foreclosure of its lien, to which he was not made a party. *Douglass v. Blount*, 95 Tex. 369 (67 S. W. Rep. 484; 58 L. R. A. 699). The effect of an execution sale is terminated by a redemption made by the agent of the execution debtor and not repudiated by him, although made without express authority, where the agent had general authority to pay and satisfy the judgment and the redemption was made with his principal's money. *Brand v. Baker*, 42 Or. 426 (71 Pac. Rep. 320). Ia. Code, § 4045, providing that no party who takes an appeal or stays an execution on a judgment shall be entitled to redeem, does not deprive one who has appealed from a provision in a decree which bars his right of redemption, and who is successful in securing this right on appeal, from afterward exercising it. *Kilmer v. Gallaher*, 116 Ia. 666 (88 N. W. Rep. 959). Ia. Code, §§ 4045, 4046, 4061 construed and applied—time for redemption—redemption by an assignee of debtor—effect on rights of judgment creditor. *People's Sav. Bank v McCarty*

Ia. (88 N. W. Rep. 1076). A debtor's right to redeem, under Ky. Stat., § 1686, is personal, not an interest in land, and is assignable, but his creditors can not claim any benefit of a redemption made by his assignee. *Potter v Skiles*, Ky.

(70 S. W. Rep. 301; 24 Ky. Law Rep. 910). The right of a judgment creditor to redeem from execution or foreclosure sales, given by Wash. Laws 1897, p. 75, § 15, does not exist as to sales under judgments rendered prior to this act. *Geddis v. Packwood*, 30 Wash. 270 (70 Pac. Rep. 481).

Sec. 633. Redemption from mortgage foreclosure. In Alabama the statutory right to redeem from a mortgage foreclosure is held to be personal and not assignable. *Terry v. Allen*, 132 Ala. 657 (32 So. Rep. 664). A bill to redeem by a junior mortgagee must allege that his debt is due and offer to pay the amount which shall be ascertained by the court to be due on the senior mortgage. *Nigman v. Humes*, 133 Ala. 617 (32 So. Rep. 574). An agreement made by a mortgagee with his mortgagor, by the terms of which the former is to bid in the premises and permit the latter to redeem, may be enforced. *Brown v. Johnson*, 115 Wis. 430 (91 N. W. Rep. 1016). To authorize a redemption from a mortgage on account of tender of performance the tender must be unconditional. *Lumsden v. Manson*, 96 Me. 357 (52 Atl. Rep. 783). A mortgagee can not claim the benefit of unreasonable improvements, upon redemption. *McQueen v. Whetstone*, 127 Ala. 417 (30 So. Rep. 548). For statement of common-law rules governing an accounting between mortgagee in possession and redemptioner, see *American Freehold Land Mortg. Co. v. Pollard*, 132 Ala. 155 (42 So. Rep. 630). Where one claiming the right to redeem from a foreclosure sale, by virtue of a subsequent mortgage, pays the amount required for redemption to the holders of the certificates of sale, who accept and retain the same, he acquires all their rights, including the right to demand and receive sheriff's deeds, and they cannot question the redemption; nor can the original owner who has remained silent during the making of the redemption assert against the redemptioner an oral contract between such owner and the purchasers by which they agreed to purchase and hold the property merely as a security for the amount of their bids and interest, the redemptioner having no knowledge of such an agreement. *McDonald v. Beatty*, 10 N. Dak. 511 (88 N. W. Rep. 281).

Sec. 634. Redemption from mortgage foreclosure—Statutes construed. Construing and applying Ala. Code, § 3507, requiring a mortgagor seeking to redeem from a foreclosure to pay or tender the purchaser or his vendee the purchase money with 10 per cent. per annum interest, it is held that where there has been a foreclosure sale of two tracts of land to the same purchaser who afterward sold one of them to another, it is not a sufficient tender for the redemptioner to tender the purchase price paid at the sale with the 10 per centum, less the amount received from the sale of the parcel

sold. *Burke v. Brewer*, 133 Ala. 389 (32 So. Rep. 602). See opinion in this case and *Baker v. Burdeshaw*, 132 Ala. 166 (31 So. Rep. 497), as to allegations required in bill to enforce statutory right to redeem from mortgage foreclosure. A purchaser of property at an execution sale can not redeem from a prior foreclosure sale, under Cal. Code Civ. Proc., § 701, subd. 2, as a creditor having a judgment lien, but he may redeem as "the successor in interest of the judgment debtor," under subd. 1, and where he has made the necessary payments and received the certificate of redemption the redemption is valid, though the certificate does not state in what capacity the redemption was made. *Pollard v. Harlow*, 138 Cal. 390 (71 Pac. Rep. 454). Under Burns' Ind. Rev. Stat., § 782, a redemption from a foreclosure sale made by one succeeding to the rights of the mortgagor restores the property, with respect to the lien and incidents of the judgment or decree for any unpaid balance, to the identical status occupied before the first sale; and where the redemption is made by one purchasing the equity of redemption from a grantee who has assumed the mortgage, his grantor who has paid the balance of the mortgage debt to avoid execution may, as surety, have a resale of the premises for the amount paid by him. *Todd v. Oglebay*, 158 Ind. 595 (64 N. E. Rep. 32). The statute of Indiana concerning the foreclosure of state endowment fund mortgages not making any provision for the redemption by the mortgagor or junior incumbrancers, no such redemption can be had. *McElwain-Richards Co. v. Gifford*, 159 Ind. 534 (65 N. E. Rep. 576). A purchaser at an abortive mortgage foreclosure sale, who has gone into possession of the mortgaged premises by consent, express or implied, of the mortgagor, or his successor in interest, in the belief that the foreclosure was regular and valid, and has remained in such possession until the redemption period has expired, has a subsisting interest under the mortgagor's title, and may redeem, under the provisions of Minn. Gen. Stat. 1894, § 6041, from the foreclosure of the senior lien. *Law v. Citizens' Bank of Northfield*, 85 Minn. 411 (89 N. W. Rep. 320; 89 Am. St. Rep. 566). In case of foreclosure of mortgage by judgment, under Mo. Rev. Stat. 1899, § 4342, the mortgagor has no statutory right of redemption after sale; and a right to redeem in equity after the sale does not exist in the absence of fraud, mistake or overreaching. *White v. Smith*, 174 Mo. 186 (73 S. W. Rep. 610). Under N. C. Code, § 152, subd. 4, ten

years possession of a mortgagee after the right to redeem has accrued bars such right. *Gray v. Williams*, 130 N. C. 53 (40 S. E. Rep. 843). Construing and applying R. I. Gen. Laws, ch. 207, § 7, giving a mortgagor entitled to redeem the right to compel the mortgagee to assign the debt and convey the property to such third person as the mortgagor directs, and investing incumbrancers of the mortgagor with this right and providing that the requisition of an incumbrancer shall prevail over that of the mortgagor, it is held that the wife of the mortgagor having an inchoate right of dower in the mortgaged premises may claim the rights of an incumbrancer under this statute. *Atwood v. Arnold*, 23 R. I. 609 (51 Atl. Rep. 216).

Sec. 635. Procedure to effect redemption—Change in redemption statute. Payment of the amount required to make a redemption to the proper officer by means of a check, given at his request, is sufficient when he afterward obtains the money on the check. *Hooker v. Burr*, 137 Cal. 663 (70 Pac. Rep. 778). Citing, *Jessup v. Carey*, 61 Ind. 584; *Webb v. Watson*, 18 Ia. 537; *Carter v. Lewis*, 27 Mich. 241; *Buford v. Henzier*, 8 Biss. 177 (Fed. Cas. No. 2114). The amendment of Cal. Code Civ. Proc., § 702, by Laws 1897, p. 41, lowering the rate of interest to be paid on redemption, applies to a redemption to a subsequent foreclosure sale under a mortgage executed prior to such amendment. *Hooker v. Burr*, 137 Cal. 663 (70 Pac. Rep. 778).

REFORMATION.

EPITOME OF CASES.

Sec. 636. What instruments may be reformed and when equity will reform them. A will can not be corrected or reformed by a court of equity by inserting in it the name of one as a devisee, alleged to have been omitted by mistake. *Engenthaler v. Engenthaler*, 196 Ill. 230 (63 N. E. Rep. 669). A commissioner's deed executed in pursuance of a judgment directing the sale of certain property cannot be reformed so as

to include property which the commissioners were not authorized by the judgment to sell, on the ground that it was omitted from the judgment though mistake. *Hull v. Calkins*, 137 Cal. 84 (69 Pac. Rep. 838). An action to reform a deed on account of a mutual mistake in it as to the location of a roadway reserved by it may be maintained by a subsequent grantee of the grantor, of another tract of land, to whom is granted the right to use the roadway as appurtenant to the land conveyed to him. *White v. Shaffer*, 97 Md. 359 (54 Atl. Rep. 974). The grantee in a voluntary deed defectively executed can not have reformation against the grantor's heirs, nor is this right given by Cal. Civ. Code, § 3399, providing that in case where, by reason of a mutual mistake, "a written contract does not truly express the intention of the parties, it may be revised on the application of the party aggrieved." *Enos v. Stewart*, 138 Cal. 112 (70 Pac. Rep. 1005). Where it appears that the scrivener drawing a deed conveying land containing coal interlined the word "surface" in the deed at the time of its execution in the presence of both parties, as a substitute for a reservation of the coal and the defendant afterward admitted that he did not buy the coal, the deed will be reformed so as to convey the land without the coal. *Baab v. Hauser*, 203 Pa. St. 470 (53 Atl. Rep. 344). Where a child of a decedent who had prepared a will and died before its proper execution joined with his widow in a deed of lands to a trustee to be by him re-conveyed to the widow and heirs according to the shares provided in the will, it being at the time understood by them that the testator intended to have his children share equally, such child may have a subsequent deed by the trustee conveying her interest to her "and her bodily heirs" reformed, so as to give her an estate in fee, though the draft of the unexecuted will gave her only the estate stated in the deed. *Weimer v. Himmel*, 200 Ill. 374 (65 N. E. Rep. 680).

Sec. 637. Mutuality of mistake required. Where it was stipulated in a contract of sale that the premises should be conveyed subject to a mortgage, a deed prepared by the grantee's scrivener under instructions to have it conform to the contract, which omits such provision, will be reformed to comply with the contract, notwithstanding any negligence of the grantor, who merely asked, without looking to see, if it were made subject to the mortgage. *Boulden v. Wood*, 96 Md. 332 (53 Atl. Rep. 911). Applying the rule that to justify reformation of

an instrument the mistake must be mutual, it is held that the amount of the consideration for a deed stated therein, in accordance with the vendor's intention, can not be changed by an action to reform the deed, there being no fraud, although it fails to express the intention of the purchaser. *Hill v. Pettit*, (Ky.) 66 S. W. Rep. 188 (23 Ky. Law Rep. 2001). The court say: "A court of equity has no power to reform an agreement between parties, except to conform it to the facts of the agreement, where these facts by mutual mistake are not made to appear, or where by the fraud of the successful party his adversary has been overreached in the drafting of the contract. Otherwise it would be in truth a power exercised by the court to contract for the parties. It follows that the mistake which it may correct in such writing must be, as it is usually expressed, the mistake of both parties to it; that is, such a mistake in the drafting of the writing as makes it convey the intent or meaning of neither party to the contract. If the court were to reform the writing to make it accord with the intent of one party only to the agreement, who averred and proved that he signed it as it was written by mistake, when it exactly expressed the agreement as understood by the other party, the writing, when so altered, would be just as far from expressing the agreement of the parties as it was before; and the court would have engaged in the singular office, for a court of equity, of doing right to one party at the expense of, and precisely equal wrong to, the other. *Diman v. Railroad Co.*, 5 R. I. 130. In *Botsford v. McLean*, 45 Barb. 478, the court said: 'A little confusion and misconception, I think, has crept into the cases from the inexact use of the word "mutual," as applied by way of description or classification of the kind of mistakes which courts of equity would reform. According to the real signification of the word "mutual" in such connection, and the ordinary acceptance and understanding of the term, "mutual mistake" would mean a mistake reciprocal and common to both parties, when each alike labored under the same misconception in respect to the terms of the written instrument.'"

Sec. 638. Correction of lease by including option to purchase. A court of equity may correct a lease by including an option of the lessee to buy, which was omitted by mutual mistake, and then enforce the contract as reformed, although the statute of frauds (Ia. Code, § 4625) makes oral evidence incompetent to establish contracts "for the creation or transfer

of any interest in lands, except leases for a term not exceeding one year." *Butler v. Threlkeld*, 117 Ia. 116 (90 N. W. Rep. 584). The court say: "That a court of equity may correct a mutual mistake in a contract by including the part omitted and then enforce the contract as reformed, notwithstanding the apparent prohibition of the statute of frauds, seems to have been settled by this court in the early case of *Ring v. Ashworth*, 3 Ia. 452. That ruling has the support of many decisions and most text-books. *Gillespie v. Moon*, 2 Johns. Ch. 585 (7 Am. Dec. 559); *Wall v. Arrington*, 13 Ga. 88; *Mosby v. Wall*, 23 Miss. 81 (55 Am. Dec. 71); *Philpott v. Elliott*, 4 Md. Ch. 273; *Tilton v. Tilton*, 9 N. H. 385; *Moale v. Buchanan*, 11 Gil. & J. 314; *Bellows v. Stone*, 14 N. H. 175; *Bradford v. Bank*, 13 How. 57 (14 L. Ed. 49); *Ruhling v. Hackett*, 1 Nev. 365; *Caley v. Railroad Co.*, 80 Pa. 363; *Smith v. Jordan*, 13 Minn. 264 (Gil. 246), (97 Am. Dec. 232); *Hunter v. Bilyeu*, 30 Ill. 228; *Schwass v. Hershey*, 125 Ill. 653 (18 N. E. Rep. 272); *Fishback v. Ball*, 34 W. Va. 644 (12 S. E. Rep. 856); *Redfield v. Gleason*, 61 Vt. 220 (17 Atl. Rep. 1076; 15 Am. St. Rep. 889); *Strickland v. Barber*, 76 Mich. 310 (43 N. W. Rep. 449). Notwithstanding this array of authority, the writer would be inclined, but for the former decision of this court, to the view that relief in such a case should be denied. The court ought not to write into a contract that which, to be enforceable, the law required the parties not only to agree to, but to reduce to writing, in order to be enforceable. It seems like an indirect attempt to enforce the specific performance of an oral agreement for the sale of land, and this is the conclusion reached by a number of eminent courts. *Elder v. Elder*, 10 Me. 80 (25 Am. Dec. 205); *Jordan v. Fay*, 40 Me. 130; *Glass v. Hulbert*, 102 Mass. 24 (3 Am. Rep. 418); *Pierce v. Colcord*, 113 Mass. 372; *Osborne v. Phelps*, 19 Conn. 63 (48 Am. Dec. 133); *Miller v. Chetwood*, 2 N. J. Eq. 199; *Davis v. Ely*, 104 N. C. 16 (10 S. E. Rep. 138; 5 L. R. A. 810; 17 Am. St. Rep. 667); *Climmer v. Hovey*, 15 Mich. 18; *Webster v. Gray*, 37 Mich. 37; *Dennis v. Dennis*, 4 Rich. Eq. 307; *Westbrook v. Harbeson*, 2 McCord, Eq. 112; *Whiteaker v. Vanschoiak*, 5 Or. 118. See note to *Woollam v. Hearn*, 2 White & T. Lead. Cas. Eq. 484; 1 Sugd. Vend. 243; 2 Whart. Ev. §§ 90-94, 1024. These decisions are in accord with the doctrine as accepted in England, tersely stated by one of the judges thus: 'In case of an executory agreement, first to reform, then to decree an execution of it, would be

virtually to repeal the statute of frauds.' *Townsend v. Stangroom*, 6 Ves. 328. But *Ring v. Ashworth*, 3 Ia. 452, is decisive and, as it is well sustained by authority, should be followed. For a review of the cases see 24 Am. Law Reg. 81."

Sec. 639. Reformation of mistakes in descriptions. A tax deed can not be reformed so as to make it conform to a description which did not exist at the date of the assessment or conveyance, or for several years before either. *Boone v. Dullion*, 80 Miss. 584 (32 So. Rep. 1). A written contract for the sale of realty can not be reformed by substituting a description by metes and bounds for a general description by lot and number, there being no mutual mistake in this particular. *Gough v. Williamson*, 62 N. J. Eq. 526 (50 Atl. Rep. 323). A mutual mistake in the description of property contained in a mortgage may be reformed as against a subsequent mortgagee whose mortgage recites that it is junior to the one sought to be reformed. *Herring v. Fitts*, 43 Fla. 54 (30 So. Rep. 804). Citing, *Lodge v. Billups*, 67 Ia. 674 (25 N. W. Rep. 846); *Gale v. Morris*, 29 N. J. Eq. 222; *Id.*, 30 N. J. Eq. 285. A purchaser at a foreclosure sale cannot maintain a bill to correct a misdescription in the mortgage, where such misdescription appears in the bill to foreclose, the decree of foreclosure, advertisement of sale, report to the court, confirmation of sale, and the deed to the purchaser. *Stephenson v. Harris*, 131 Ala. 470 (31 So. Rep. 445). One need not be in possession of land in order to maintain a bill to reform a description in a deed thereof. *Bieler v. Dreher*, 129 Ala. 384 (30 So. Rep. 22). Ala. Code, 1896, § 808 construed and applied—correction of misdescription in deed made under decree of sale in probate court. *Vaughan v. Hudson*, 129 Ala. 176 (30 So. Rep. 75). For particular cases illustrating when description in conveyances will be corrected, see *Ackerman v. Begrisch*, N. J. Eq. (50 Atl. Rep. 673); *Peters v. Fell*, 15 N. Dak. 391 (89 N. W. Rep. 1014).

Sec. 640. Reformation of mistakes in descriptions—Conveyance of married woman. When a married woman intends to mortgage or convey her real estate and to accomplish such purpose executes a proper instrument, in conjunction with her husband, with all the formalities required by law, but by mistake of the scrivener an erroneous description of the land is inserted, contrary to the intent of the parties, a court

of chancery has power to correct the mistake upon clear proof of the fact, and in so doing the intent and policy of our laws in reference to alienation of real estate by married women are not contravened. *Herring v. Fitts*, 43 Fla. 54 (30 So. Rep. 804). The court say: "Causing the true description to be read into the deed neither makes a new conveyance nor changes the old one; it simply makes the conveyance effective by applying it to the property intended to be included. There is a decided conflict of authority on the point under laws similar to ours, and there is much weight in those holding a contrary view to that we adopt; but, after much reflection, we think they do not announce the correct doctrine. Our conclusion is sustained by the following decisions, which we think state the correct view: *Hamar v. Medsker*, 60 Ind. 413; *Styers v. Robbins*, 76 Ind. 547; *Gardner v. Moore*, 75 Ala. 394 (51 Am. Rep. 454); *Stevens v. Holman*, 112 Cal. 345 (44 Pac. Rep. 670; 53 Am. St. Rep. 216); note to *Williams v. Hamilton*, 65 Am. St. Rep. commencing on page 511 (104 Ia. 423; 73 N. W. Rep. 1029). It was supposed that California had adopted a different view in the case of *Leonis v. Lazzarovich*, 55 Cal. 52, but, if this case can be so construed, it has been overruled by *Loan Soc. v. Meeks*, 66 Cal. 371 (5 Pac. Rep. 624), and *Stevens v. Holman*, 112 Cal. 345 (44 Pac. Rep. 670; 53 Am. St. Rep. 216)."

Sec. 641.—Parties, pleading and practice in actions for reformation. Sureties on a bond to secure which a mortgage is given by the principal thereon, are proper coplaintiffs with him in an action to reform a mistake in the mortgage by which a portion of the property was omitted. *Grigsby v. Barton County*, 169 Mo. 221 (69 S. W. Rep. 296). A bill which alleges that through a mutual mistake the deed which it asks to have reformed failed to express the true intention of the parties to it as to the location of a road reserved by it, and also contains a distinct allegation of what was the real intention of both parties to the deed as to the location of the road, is sufficient. *White v. Shaffer*, 97 Md. 359 (54 Atl. Rep. 974). A court of equity having acquired jurisdiction of an action to reform a deed may grant further equitable relief, such as an injunction against threatened attachment proceedings which would be a cloud on the title. *Bieler v. Dreher*, 129 Ala. 384 (30 So. Rep. 22). Where the parties to a deed erroneously supposed that the description used therein applied to the land

intended to be conveyed, the mistake is one of fact which may be reformed. In such a case one action may be maintained to reform the deed and recover possession, and no previous demand is necessary; nor is it necessary to determine on demurrer to the complaint whether the issue as to reformation or possession shall control, except in so far as delay in trying the action is concerned; and the complaint will not be held bad on demurrer because of delay in bringing the suit, where the rights of third parties have not intervened, and the defendant has not suffered, and will not suffer any injury. *Earl v. Van Natta*, 29 Ind. App. 532 (64 N. E. Rep. 901). Construing and applying Shannon's Tenn. Code, §§ 6301-6303, providing that title may be divested by decree and that the court may appoint a commissioner to execute the necessary conveyances, and that "if the decree direct the conveyance, release or acquittance to be made, and the party against whom the decree is rendered fails, or refuses, to execute the same in the time specified in the decree, or in a reasonable time, if no particular time is thus specified, the decree operates in all respects as if the conveyance, release, or acquittance was made," it is held that where a decree was rendered against a grantor in a suit for the reformation of a deed, and the court appointed a commissioner to execute the proper deed, which he failed to do, such commissioner was a "party" to the suit, within the meaning of the statute, and title became vested in the grantee and subsequent innocent purchasers from him, as against heirs of the defendant afterward suing on a writ of error and of whose claim the purchasers had no notice. *Behrn v. White*, 108 Tenn. 392 (67 S. W. Rep. 810).

Sec. 642. Proof required in actions for reformation.

Reformation of a conveyance of lands will not be decreed except on clear proof that by mutual mistake of the parties thereto it expressed something which they did not intend, or omits to express something which they did intend. *Aller v. Crouter*, 64 N. J. Ep. 381 (54 Atl. Rep. 426); *Topping v. Jennette*, 64 Neb. 834 (90 N. W. Rep. 911); *Hough v. Smith*, 132 Ala. 204 (31 So. Rep. 500). The evidence to reform a deed on account of a mistake must be not only clear, precise and indubitable, but must relate to the time when the instrument was executed. *Williamson v. Carpenter*, 205 Pa. St. 164 (54 Atl. Rep. 718). More than a bare preponderance of the evidence is required in order to reform a deed for alleged fraud or mis-

take, *Stroupe v. Bridger*, Ia. (90 N. W. Rep. 704); but proof beyond a reasonable doubt is not required, *Topping v. Jennette*, 64 Neb. 834 (90 N. W. Rep. 911). To justify the reformation of a written lease by inserting additional terms, alleged to have been omitted by mistake, the alleged omission or mistake must be shown by clear, unequivocal and satisfactory proof. *Chapman v. Dunwell*, 115 Ia. 533 (88 N. W. Rep. 1067). A mortgage conditioned to pay a certain sum to the mortgagee and "successors" will be reformed by substituting the word "heirs," where it appears that it was the intention of the parties to convey a fee and the attorney who drew the instrument used the word "successors" in the sense of "heirs." A mortgage to secure the payment of a debt in five years, with interest from date at "5 per cent., five years from date, which will be on May 1, 1905," will be reformed so as to make the interest payable annually upon the testimony of the agent of the mortgagees that such was the intention, although the attorney who drew the instrument testified that the interest was to be paid at the end of five years; the court holding that the latter contention is so contrary to usage and common experience that it should be fortified by convincing evidence before it becomes credible. *Whelen v. Osgoodby*, 62 N. J. Eq. 571 (50 Atl. Rep. 692). For particular fact cases as to sufficiency of evidence to authorize a reformation, see *Boyd v. Schott*, 29 Ind. App. 74 (63 N. E. Rep. 871); *Scheurmann v. Styninger*, 130 Mich. 468 (90 N. W. Rep. 292); *Hough v. Smith*, 132 Ala. 204 (31 So. Rep. 500).

RENTS.

EPITOME OF CASES.

Sec. 643. Right to rents—Miscellaneous notes. The right to the "rents and profits" of land embraces the rents and profits of not only the surface, but of all beneath the surface. *Russell v. Berry*, 70 Ark. 317 (56 S. W. Rep. 864). The fact that a lease by an administrator includes land which his decedent did not own does not make him liable to the real owner

thereof for rent collected on account of such lease. *Miller & Lux v. Gray*, 136 Cal. 261 (68 Pac. Rep. 770). Rents accruing after the death of the decedent, and before the exercise of a power of sale, go with the title of the land to the heir or devisee, and not to the executor. *Bittle v. Clement*, N. J. Eq. (54 Atl. Rep. 138). Rents of devised lands may be claimed by an executor when required to pay the testator's debts. *Shell v. West*, 130 N. C. 171 (41 S. E. Rep. 65). A purchaser of the equity of redemption from the owner thereof is bound by a prior appointment in foreclosure proceedings of a receiver for rents and profits, and he can not recover by a collateral action rents and profits accruing during foreclosure, where it appears that such owner was a party to such foreclosure proceedings in which the receiver was appointed, and that the sale of the equity of redemption was made after foreclosure sale of the property had been made and the receiver had made a partial report which had been approved. *Equitable Trust Co. v. Wilson*, 200 Ill. 23 (65 N. E. Rep. 430).

Sec. 644. Right to rents—Mortgagor and mortgagee. Rents accruing on mortgaged premises before the filing of a bill to foreclose the mortgage, in possession of one holding them in trust for a grantee of the premises who had assumed the mortgage, are not to be applied on a deficiency decree but belong to such grantee. *Gandy v. Coleman*, 196 Ill. 189 (63 N. E. Rep. 625). A mortgagee taking possession of the mortgaged premises on account of the default of his mortgagor, in pursuance of a stipulation in the mortgage giving him this right upon such default, will be held to account for the rents and profits in a subsequent action for foreclosure or to redeem. *Felino v. K. S. Newcomb Lum. Co.*, 64 Neb. 335 (89 N. W. Rep. 755). N. Dak. Rev. Codes, § 5549 construed and applied—right of mortgagor to demand of purchaser in possession during year of redemption a verified statement of value of use and occupation of premises during such period. *Little v. Worner*, 11 N. Dak. 382 (92 N. W. Rep. 456).

Sec. 645. Right to rents—Purchaser at foreclosure sale. Under Burns' Ind. Rev. Stat., § 779, a purchaser at a general judgment or foreclosure sale in his relation as a purchaser is not entitled to rents accruing for one year after his purchase, but in foreclosure proceedings an insolvent mortgagor or owner, who does not redeem, and who holds possession by

a tenant, as in this case, during the year for redemption, is not entitled to the rents and issues of the property as against a mortgagee purchaser, whose judgment is not wholly paid; and this right is not lost to the mortgagee by reason of the fact that he took no personal judgment against a defendant who had purchased the land of the mortgagor. *Russell v. Bruce*, 159 Ind. 553 (64 N. E. Rep. 602). Construing and applying Hill's Ann Or. Laws, § 307, providing that a purchaser of land at a judicial or execution sale, from the day of sale until a resale or redemption shall be entitled to the possession unless the same be in the possession of a tenant holding under an unexpired lease, in which case he shall be "entitled to receive from the tenants the rents or the value of the use and occupation thereof during the same period," it is held that a purchaser at a mortgage foreclosure sale of land in possession of a tenant under an unexpired lease executed after the execution of the mortgage is entitled to the rent, or the value of the use and occupation of the premises, from the day of sale, notwithstanding the tenant, in accordance with his lease, has paid the rent in advance to his lessor. *United States Mortg. & T. Co. v. Willis*, 41 Or. 481 (69 Pac. Rep. 266). Citing, *Harris v. Foster*, 97 Cal. 292 (32 Pac. Rep. 246; 33 Am. St. Rep. 187); *Walker v. McCusker*, 71 Cal. 594 (12 Pac. Rep. 723); *Byers v. Rothschild*, 11 Wash. 296 (39 Pac. Rep. 688). Under this statute, where a purchaser at a foreclosure sale is deprived of possession by appeal and supersedeas bond, upon affirmance of the decree, he is entitled to recover on such bond the value of the use and occupation of the land, not exceeding the amount of the bond. *German Sav. & Loan Soc. v. Kern*, 42 Or. 532 (70 Pac. Rep. 709).

Sec. 646. Creation of liability to pay rent. No implied agreement to pay rent to his wife arises on the part of a husband by their occupying her property as a home. *Gardner v. Gardner*, 29 Ind. App. 449 (64 N. E. Rep. 637). Where one continues to graze his stock upon the land of another, after being notified that he will be required to pay rent unless he desists from doing so, an implied promise to pay a reasonable rent for such use of the land arises. *Gillespie v. Hendren*, 98 Mo. App. 622 (73 S. W. Rep. 361). No liability for rent can arise against a city on account of a lease to it in which it is expressly stipulated that there should be no liability thereon unless the city council should make an appropriation therefor,

where no such appropriation was ever made, although the city was under moral obligation to make the appropriation and had power to bind itself to pay rent before the making of such an appropriation. *Marsh, Merwin & Lemmon v. City of Bridgeport*, 75 Conn. 495 (54 Atl. Rep. 196). A lessor of real property has no right of action against a third party for the use and occupation of a portion of the leased premises during the duration of the lease and at a time when the lessee was entitled to the possession of the property. *Southern Ry. Co. v. State*, 116 Ga. 276 (42 S. E. Rep. 508). A lessor leasing an entire house, in the attic of which he has his goods stored and locked, to one who takes possession without knowledge of this fact, and to whom he refuses to surrender the attic when requested to do so, can not recover for use and occupation on the express contract, because he has not furnished the stipulated consideration; nor can he recover upon an implied one for the benefit actually received because the failure to furnish the whole was due to his own wilful fault. *Moore v. Mansfield*, 182 Mass. 302 (65 N. E. Rep. 398; 94 Am. St. Rep. 657). A stipulation in a lease that it shall be void upon the lessee's failure to pay rent is for the benefit of the lessor, and the lessee can not by his default in the payment of an installment of rent, terminate the lease and thus release his sureties from liability for future installments. *English v. Yates*, 205 Pa. St. 106 (54 Atl. Rep. 503). A lessor in a lease for a term of years at a fixed annual rental with right of re-entry upon the failure to pay rent, is not entitled to demand from a receiver appointed upon the insolvency of the lessee, rent accruing under the lease after the receiver quits the premises. *Klein v. W. A. Gavenesch Co.* 64 N. J. Eq. 50 (53 Atl. Rep. 196). See opinion for discussion of this subject.

Sec. 647. Defenses in actions for rent. In an action by a corporation lessor on a guaranty of a third person for the payment of the rent, he can not defend on the ground that the acquisition of the property by the corporation was *ultra vires*. *Nantasket Beach S. S. Co. v. Shea*, 182 Mass. 147 (65 N. E. Rep. 57). A defendant in an action for rent can not deny his lessor's title. *Shell v. West*, 130 N. C. 171 (41 S. E. Rep. 65). As against a claim for full rent filed by a landlord in bankruptcy proceedings of his tenant, a prior agreement to reduce the rent may be shown. *Evans v. Lincoln Co.*, 204 Pa. St. 448 (54 Atl. Rep. 321). A lessee can not set up as a defense to an

action on a lease for rent a parol agreement between him and his lessor made before the execution of the lease that if the lessee should take a lease of another building of the lessor, which he had done, the lessor would surrender all rights under the first lease. *Taylor v. Goding*, 182 Mass. 231 (65 N. E. Rep. 64). A tender of his check for rent made by a lessee who has money in the bank sufficient to pay the check is sufficient where his lessor has been in the habit of receiving such checks for the rent and refuses the particular check for other reasons than the failure of the lessee to tender the money. *Bonaparte v. Thayer*, 95 Md. 548 (52 Atl. Rep. 496). As to what is the proper measure of damages to award a defendant who sets up a breach of his landlord's covenant to make repairs, see *Frederick v. Daniels*, 74 Conn. 710 (52 Atl. Rep. 414).

Where a lessor conveys the leased premises to a third person without reserving the rent to become due thereafter, the lessee may defend against an action by the lessor to recover such rent, without having been evicted by title paramount, or disturbed in his possession during the term. *Allen v. Hall*, Neb. (92 N. W. Rep. 171). The court say: "The great weight of authority is that rent is an incident to the reversion, and a deed without reservation invests the grantee with the right to recover it. The defense thus arising in favor of the lessee, against an action by the lessor for rent falling due after an assignment of the reversion, does not depend upon eviction or ouster by the assignee, but is complete without it. *English v. Key*, 39 Ala. 113; *Franklin v. Palmer*, 50 Ill. 205; *Burden v. Thayer*, 3 Metc. (Mass) 76 (37 Am. Dec. 117); *Van Wicklin v. Paulson*, 14 Barb. 654; *Demarest v. Willard*, 8 Cow. 206; *Peck v. Northrop*, 17 Conn. 217."

Sec. 648. Collection of rent by distress. A covenant to pay water rent is a covenant to pay to the party entitled to it and can not be enforced by distress. *Evans v. Lincoln Co.*, 204 Pa. St. 448 (54 Atl. Rep. 321). A distress warrant, issued upon an affidavit alleging that the rent distrained for "is now due and unpaid," is sufficiently met by a counter affidavit alleging that "the sum distrained for under the warrant issued * * * was not due at the time of issuing said warrant"; and, in the absence of a demurrer to such counter affidavit specially presenting the point that it embraced no general denial of indebtedness for rent, any competent evidence tending to show that no such indebtedness actually existed is admissible

in behalf of the defendant. *Feagin v. McGowen*, 115 Ga. 325 (41 S. E. Rep. 575). For particular affidavit made by one as attorney held to be insufficient, see *Bryan v. Teal*, 115 Ga. 740 (42 S. E. Rep. 34). When a landlord lawfully distrains for rent justly due, but in the subsequent proceedings acts irregularly or unlawfully, the tenant can not maintain a suit for such irregular or unlawful act unless he shows that he has thereby sustained special damage. *Brown v. Howell*, 68 N. J. L. 292 (53 Atl. Rep. 459).

RESULTING TRUSTS.

EPITOME OF CASES.

Sec. 649. General principles and particular cases. A resulting trust can not be founded on an express agreement. *Byers v. McEniry*, 117 Ia. 499 (91 N. W. Rep. 797). Constructive trusts have their roots in actual or legal fraud, and generally arise in cases where there is no intention to create a trust. *Alexander v. Spaulding*, 160 Ind. 176 (66 N. E. Rep. 694). A resulting trust can not arise from a conveyance made for a valuable consideration; and an absolute conveyance does not create a constructive trust where there was no fraud, misrepresentation, imposition, circumvention, artifice, or concealment, or abuse of confidential relations. *Verzier v. Convard*, 75 Conn. 1 (52 Atl. Rep. 255). One bidding off property at a mortgage foreclosure sale, under an agreement made with the mortgagor by which he is to purchase the property for him, and on account of which he obtains it at a reduced price, may be charged with a trust in favor of such mortgagor. *Coleman v. McKee*, 24 R. I. 596 (54 Atl. Rep. 374). A sister receiving a conveyance of property from her brother in good faith with the intention to keep the same for him for his protection, and to prevent others from defrauding him and depriving him of the property, and with the intent only to manage the same for him, will be held to be a trustee for her brother. *Odel v. Moss*, 137 Cal. 542 (70 Pac. Rep. 547).

Sec. 650. Degree of parol proof required to establish a resulting trust. In discussing the degree of proof required

to establish a resulting trust by parol evidence, the supreme court of Nebraska, in the case of *Doane v. Dunham*, 64 Neb. 135 (89 N. W. Rep. 640), say: "While we may not admit the statements often to be seen in the books, that more than a preponderance of the evidence is required to establish a trust, contrary to the purport of a written instrument, by parol, and that the trust in such cases must be proved beyond doubt, there is no occasion to repudiate or qualify what has become a commonplace of the books, that the proof in such cases must be clear, unequivocal, and convincing." On this subject, the supreme court of South Dakota, in the case of *Sing You v. Wong Free Lee*, S. Dak. (92 N. W. Rep. 1073), say: "In *Howland v. Blake*, 97 U. S. 624 (24 L. Ed. 1027), the supreme court of the United States, speaking upon this subject says: 'In each case the burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writings will be held to express correctly the intention of the parties.' And this view seems to be sustained by the following authorities: 1 Story Eq. Jur. § 157; 2 Pom. Eq. Jur. § 1040; *Dalton v. Dalton*, 14 Nev. 419; *Maxwell Land Grant Case*, 121 U. S. 365 (7 Sup. Ct. Rep. 1271; 30 L. Ed. 949); *Crissman v. Crissman*, 23 Mich. 217; *Nichols v. McDonald*, 101 Pa. 514; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Lench v. Lench*, 10 Ves. 511; *Nevius v. Dunlap*, 33 N. Y. 676." To the same effect, see *Jesser v. Armentrout's Ex'r*, 100 Va. 666 (42 S. E. Rep. 681); *Owensby v. Chewning*, 171 Mo. 226 (71 S. W. Rep. 122).

Sec. 651. Trusts arising out of fraud or violation of contract. One who, by taking advantage of the confidence of his sister-in-law in him, causes her to convey land to him when she supposed she was only giving him a power of attorney to manage the land for her in accordance with her previous agreement with him, will be held to be a constructive trustee, and becomes bound to reconvey the land and account for rents and profits. *Kahm v. Klaus*, 64 Kan. 24 (67 Pac. Rep. 542). The court say: "There was no agreement that the grantee, Kahm, should take and hold the title of the land for the use and benefit of the grantor. Klaus. The agreement was that he should manage the land for her as her agent. In-

stead of procuring from her a writing fit and appropriate to express such agreement, he procured from her a conveyance of the title, without her knowledge of the character of the instrument. Such being the case, he became a trustee *ex maleficio*. The trust which arose out of the transaction was not an express trust, but was an involuntary or constructive trust, or, as termed in our statute, one which 'arises by implication of law.' This class embraces all those instances in which one through the fraud of another has given over his property to such other without an intention to create a trust relation. In such instances equity nevertheless raises or implies a trust, and holds the constructive trustee to an account. The books abound in cases illustrating and enforcing this doctrine. *Newell v. Newell*, 14 Kan. 202; *Farmers' & Traders' Bank v. Kimball Milling Co.*, 1 S. Dak. 388 (47 N. W. Rep. 402; 36 Am. St. Rep. 739); *Larmon v. Knight*, 140 Ill. 232 (29 N. E. Rep. 1116; 33 Am. St. Rep. 229)."

Where one who has taken conveyances of land from another, who, at the time was in fear of death, on a parol understanding as to the disposition of the property, afterward converts the property to his own use, equity may relieve on the theory of a constructive trust, though there was no fraud in the procurement of the instruments. *Kimball v. Tripp*, 136 Cal. 631 (69 Pac. Rep. 428). A grantee's mere breach of or denial of his oral agreement which induced the conveyance of land to him, without additional proof of fraud or imposition at the time the conveyance was made, will not constitute him a trustee *ex maleficio*. *Gregory v. Bowsby*, 115 Ia. 327 (88 N. W. Rep. 822). The court say: "Mere breach of or denial of the oral agreement does not, as we have said, constitute a fraud. 'It seems to be requisite,' says Chief Justice Gibson in *Hoge v. Hoge*, 1 Watts, 163 (26 Am. Dec. 52), 'that there should have been an agency, active or passive, on the part of the grantee, in procuring the deed.' Or, as was said by Mr. Pomeroy, in his work on Equity Jurisprudence (section 1055); 'There must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated.' Breach of the agreement may, of course, be considered, but it is not alone sufficient. There must be also some clear and explicit evidence of fraud or imposition at the time of the making of the conveyance to constitute the purchaser a trustee *ex maleficio*. The instant case, however, does not present the question of the quantity

of proof required, for, as has been stated, it was decided upon a demurrer to the petition, which pleads fraud in the inception of the transaction, and specifically alleges that the deed was made through defendant's agency, and upon his promise and representations, with the specific intent to cheat and defraud. Our observations regarding the character of the evidence required will perhaps prevent misapprehension of the rule in the future. The authorities are not harmonious on the questions discussed, although the points of difference seem to relate more to the quantum of proof in addition to the mere breach of promise than to the rule itself. We cite in this connection: *Patton v. Beecher*, 62 Ala. 579; *Wheeler v. Reynolds*, 66 N. Y. 227; *Glass v. Hulbert*, 102 Mass. 24 (3 Am. Rep. 418); *Morrall v. Waterson*, 7 Kan. 199; *Fairchild v. Rasdall*, 9 Wis. 379; *Johnson v. Hubbell*, 10 N. J. Eq. 332 (64 Am. Dec., 773); *Brison v. Brison*, 75 Cal. 525 (17 Pac. 689; 7 Am. St. Rep. 189); *Pom. Eq. Jur.* §§ 1055, 1056."

Sec. 652. Trusts arising from the payment of purchase money. A trust in lands will not result in favor of the grantor in conveyance thereof, upon a valuable consideration therein expressed, upon parol proof that no part of the consideration was paid, and that the conveyance was wholly voluntary. *Aller v. Crouter*, 64 N. J. Eq. 381 (54 Atl. Rep. 426). Cal. Civ. Code, § 853, providing that "when a transfer of property is made to one person, and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made," applies where only a part of the purchase money is advanced, in which case a resulting trust *pro tanto* arises. The presumption created by this statute may be rebutted by parol evidence. *Faylor v. Faylor*, 136 Cal. 92 (68 Pac. Rep. 482). Under *Burns' Ind. Rev. Stat.*, §§ 3396-3398, no trust results to the person paying the consideration for real estate conveyed to another, except "(1) Where the conveyance is taken in the name of the alienee without the consent of the party paying the purchase money. (2) Where the alienee, in violation of some trust, has purchased the estate with money not his own. (3) Where by agreement, and without any fraudulent intent, the party to whom the conveyance is made is to hold the land in trust for the party paying the purchase money, or some part thereof." *Alexander v. Spaulding*, 160 Ind. 176 (66 N. E. Rep. 694); *Brown v. White*, 32 Ind. App. 100 (67 N. E. Rep.

273). See opinions in these cases for particular facts held insufficient to create a resulting trust under the statute. The statute of Michigan (3 Comp. Laws 1897, § 8835) expressly declares that when a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the alienee in such conveyance, subject only to the provisions of the next section, which relates to creditors. *Hamilton v. Wickson*, 131 Mich. 71 (90 N. W. Rep. 1032).

Sec. 653. Trusts arising from the payment of purchase money—Conveyance to parent, husband or wife. Where land purchased, paid for and taken possession of by an emancipated minor son is conveyed to his father, on account of the belief that the son was incapable of taking title, a trust results in the son's favor. *Grayson v. Bowlin*, 70 Ark. 145 (66 S. W. Rep. 658). A husband taking title to lands which he has purchased with funds belonging to his wife, holds the same in trust for her, and after his death his heirs cannot claim any interest in them, *Black v. Black*, 64 Kan. 689 (68 Pac. Rep. 662); but where he receives funds belonging to his wife, and with her knowledge and consent invests it in real estate in his own name, the law raises a prima facie presumption of a gift, *Crumrine v. Crumrine*, 50 W. Va. 226 (40 S. E. Rep. 341; 88 Am. St. Rep. 859). In Virginia, previous to the married woman's act of Apr. 4, 1877 (Laws 1876-77, p. 333), where a woman having money settled to her separate use marries, and the husband purchases with it real estate, and takes the conveyance in his own name, no trust results in the wife's favor. *Jesser v. Armentrout's Ex'r*, 100 Va. 666 (42 S. E. Rep. 681). Where the husband places the title to lands in his wife without consideration, whether by conveyance directly, or by procuring conveyance to her by others, a gift is presumed. *Doane v. Dunham*, 64 Neb. 135 (89 N. W. Rep. 640); *Johnston v. Johnston*, 96 Md. 144 (53 Atl. Rep. 792). See opinion for particular evidence held insufficient to rebut such presumption. This presumption is one of fact which may be rebutted by evidence, and when this is done the parties stand as other parties. Proof that the conveyance was made to the wife without the knowledge or consent of the husband rebuts the presumption and a trust results in his favor. *Flanner v. Butler*, 131 N. C. 155 (42 S.

E. Rep. 547). A husband cannot enforce a resulting trust in lands purchased by his wife with money deposited in bank in her name by the assignee in insolvency of a firm of which the husband was a member, in payment of notes he caused to be executed to her by the firm upon its approaching insolvency. *Flanner v. Butler*, 131 N. C. 151 (42 S. E. Rep. 557; 92 Am. St. Rep. 773). A husband who joins his wife in the execution of a note given by his wife for purchase price of land deeded to her, and in the execution of a mortgage thereon to secure the note, his payment of such note after her death and after his personal liability thereon has been barred by limitations, made by him to relieve the land from the mortgage lien and under the mistaken belief that he was the owner of the land, does not create a resulting trust in his favor. *Wilder's Ex'x v. Wilder*, 75 Vt. 178 (53 Atl. Rep. 1072).

RIGHT OF WAY.

EPITOME OF CASES.

Sec. 654. Right of way agreements—Consideration—Construction—Right of railroad company in possession. Where the construction of a proposed railroad will result in materially lessening the distance of a landowner's residence from a railroad depot, this is sufficient consideration for an agreement by him to donate land for its right of way; and he is estopped to deny such an agreement after the company in reliance thereon has expended large sums in partially building its road. *Cadiz R. Co. v. Roach*, Ky. (72 S. W. Rep. 280; 24 Ky. Law Rep. 1761). A railroad company is not bound, without covenant to that effect, to construct its track on the center line of its right of way; but where the grant of a right of way fifty feet wide to a railroad company calls for a certain, fixed and determined center line, the construction of the track on either side of such center line will not shift such center line to the center of such track, and thus shift such right of way, without the consent of the grantor. *Ohio River R. Co. v. Johnson*, 50 W. Va. 499 (40 S. E. Rep. 407). A stipulation in a conveyance to a railroad company of "the right of way on the north half" of certain described land, "forty feet in width

from the center line" of the road, "measured on the north of said railroad," that the grantor is "to have the privilege of fencing within twenty feet of the center line of said railroad after said railroad is finished for the purpose of cultivation," conveys a right of way forty feet wide from the center of the track, with a license reserved to the grantor to cultivate the outside twenty feet thereof; and his possession and use of said twenty feet is not adverse, nor does the company abandon such twenty feet by the erection of a fence excluding it. *Chicago & S. E. Ry. Co. v. Wood*, 30 Ind. App. 650 (66 N. E. Rep. 923). A railroad company, which has purchased land for a right of way, and is in possession, is not affected by condemnation proceedings against the grantor by another company. *Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co.*, 116 Ia. 681 (88 N. W. Rep. 1082).

If a railway corporation takes possession of land for a private purpose, its right to do so resting in a grant by the owner thereof, and it subsequently loses that right by forfeiture to the owner, it cannot thereafter defy such owner and continue to enjoy his property because it might successfully proceed in good faith to acquire it for a public purpose. *Maginnis v. Knickerbocker Ice Co.*, 112 Wis. 385 (88 N. W. Rep. 300). For construction of particular right of way contracts, see *Pontiac, O. & N. R. Co. v. Reed*, 130 Mich. 661 (90 N. W. Rep. 658); *Roberts v. White River Water Power Co.*, 30 Wash. 430 (70 Pac. Rep. 1104); *King v. Norfolk & W. Ry. Co.*, 99 Va. 625 (39 S. E. Rep. 701); *McElroy v. Kansas City & I. Air Line*, 172 Mo. 546 (72 S. W. Rep. 913). The decision in the case of *Rector, etc., of Church of Holy Communion v. Paterson R. Co.*, 66 N. J. L. 218 (49 Atl. Rep. 1030; 55 L. R. A. 81, epitomized in *Ballard's Law of Real Prop.* Vol. IX, § 701), is re-affirmed in the later opinion of *Paterson Ext. R. Co. v. Rector, etc., of Church of Holy Communion*, N. J. (53 Atl. Rep. 449).

Sec. 655. Right of way agreements—Specific performance. A covenant by a railroad company in a deed of lands to it, and which forms a part of the consideration therefor, "to establish and maintain a freight and passenger depot" thereon, may be specifically enforced; and parol evidence is admissible to explain its meaning. *Murray v. Northwestern R. Co.*, 64 S. C. 520 (42 S. E. Rep. 617). Where land for a right of way is conveyed to a railroad company under an agreement that

one or more under track crossings of certain specified dimensions are to be built and maintained for the convenience of the grantor in working the land across which the road is constructed, a court of equity will decree specific performance of the contract, and not leave the grantor to his action for damages, when specific performance will alone answer the purpose of justice. *Gloe v. Chicago, R. I. & P. Ry. Co.*, Neb. (91 N. W. Rep. 547).

Where a contract under which a railway company enters and obtains a right of way provides that it shall place its fences at the edge of the pit ground, on both sides of its track, and that it shall construct a switch or side track on the land granted for the right of way, specific performance will be decreed, and cannot be defeated on the ground that it is impracticable to compel specific performance. *Lane v. Pacific & I. N. Ry. Co.*, Ida. (67 Pac. Rep. 656). The court say: "It is also contended by respondent that a decree for specific performance so far as the fence is concerned would be an idle thing, as the defendant is, under the contract, the judge as to how much of the right of way is necessary to protect the cuts and fills; hence, that it may, under the contract, place its fence where it pleases on the right of way. We think the contract definitely fixes the position in which the fences shall be placed, viz., as near the edge of the pit ground on both sides of the track as possible, giving all necessary protection to the roadbed, cuts and fills. As to whether it shall be one foot or some other distance is to be determined from the facts as they shall appear in the evidence, and may depend upon the depth of a cut or the height of a fill at a given point, and the liability of the earth to slide at given points. That distance may or may not be greater at one given point than at another. The facts showing necessity to place it beyond the edge of the pit must appear. It is not difficult for the defendant to comply with the stipulation in the contract relating to fences.

It is argued by the respondent that courts do not engage in building switches or railroads or fences, and cannot specifically enforce contracts of the kind involved in this case, and it cites the case of *Railroad Co. v. Rust*, (C. C.) 17 Fed. Rep. 275, as sustaining this position. We do not think the decision named has any bearing as a precedent in the case at bar. The facts in that case are not at all like those set forth in the complaint in this action. It is true that the court will not undertake to build the switch contemplated in the said contract, but, if

the facts alleged in the complaint shall be established at the trial, it will be the duty of the court to decree that the defendant shall do so, and the power to compel compliance with such decree undoubtedly exists in the court."

Sec. 656. Grants of right of way—Estate granted—Right of grantee to minerals. A grant of a right of way to a railroad company is the grant of an easement merely, and the fee remains in the grantor. *McLemore v. Memphis & C. R. Co.*, Tenn. (69 S. W. Rep. 338). Particular contract for and conveyance of right of way to a railroad company held to convey a fee. *Camden & T. Ry. Co. v. Adams*, 62 N. J. Eq. 656 (51 Atl. Rep. 24). An agreement between a landowner and a railroad company in which he "does hereby grant and convey" unto the said company "the full and free right of way of the width of fifty feet * * * in, upon and through" his lands, and "covenants and agrees to execute and acknowledge in due form of law, when required by said company, a deed conveying to said company in fee simple the land herein-before described," conveys only a right of way, an easement, and does not give the company any right to the minerals in the land. *Uhl v. Ohio River R. Co.*, 51 W. Va. 106 (41 S. E. Rep. 340). The court say: "This agreement is not, in a legal point of view, ambiguous. Its very face says that the motive and purpose inspiring it, the occasion for its execution, was the obtaining by the company of right of passage for a railroad through Uhl's farm, and to accomplish this purpose a 'right of way' was granted 'in, upon and through lands of said Uhl.' This is the core of the writing, its essence, its grant, and it speaks a purpose to concede simply a right of way, an easement, a passage for the road. It does not imply a grant of the very land itself, but only a right of way 'in, upon, and through the lands' of Uhl. Those prepositions, 'in,' 'upon,' 'through,' speak this intent to concede mere passage. If the intent were to grant the land to all intents, why did not the paper do so then by the use of the word 'land' in connection with the word 'grant?' And treating it as an executory agreement, why did it not use the word 'land' in its essential part? Why did it use the words 'right of way'? Take the words 'right of way.' Prima facie they legally imply only an easement. To give them other meaning there must be other words so showing. True, when we speak incidentally of 'right of way,' we may mean the land on which the right of way exists; but in a grant to a rail-

road it means only the easement. As this is strongly contested by able counsel in the elaborate argument which has taken place in this hotly contested case, I have for the second time examined this question, and am confirmed in such opinion. 'The words "right of way" in a grant describe a tenure, not the land granted.' *Railroad Co. v. Lesuere*, (Ariz.) 19 Pac. Rep. 157 (1 L. R. A. 244). A deed conveyed to a railroad company a 'certain piece of land * * * described as follows, to-wit, the right of way for a railroad running * * * a strip of land forty feet wide and nine hundred and fifty-two feet in length,' with full covenant of warranty; and it was held that the deed conveyed an easement, not a fee in the land. *Jones v. Van Bochove*, 103 Mich. 98 (61 N. W. Rep. 342). "A right of way," in its legally and generally accepted meaning in reference to a railway, is a mere easement in the land of others obtained by condemnation or purchase.' *Williams v. Railway Co.*, 50 Wis. 71 (5 N. W. Rep. 482); *Lumber Co. v. Harris*, 77 Tex. 18 (13 S. W. Rep. 453). In the first case cited the court said: 'It would be using the term in an unusual sense, by applying it to an absolute purchase of the fee simple of lands to be used for railroad purposes.' A railroad company owning land conveyed it, 'reserving and excepting a strip of land * * * to be used for a right of way or other railroad purposes.' Held that the deed passed the whole fee to the purchaser, and that the company reserved only a right of way. *Biles v. Railroad Co.*, 5 Wash. 509 (32 Pac. Rep. 211). A deed said, 'do grant and convey to said R. R. Co. the following piece or tract of land * * * for the construction of said road, to have and to hold to said company forever,' and it was held to convey 'a right of way simply,' not a fee. *Barlow v. Railroad Co.*, 29 Ia. 276. In *Vermilya v. Railway Co.*, 66 Ia. 606 (24 N. W. Rep. 234; 55 Am. Rep. 279), the court said that the words 'right of way' meant an easement only. In *Railway Co. v. McWilliams*, 71 Ia. 164 (32 N. W. Rep. 315), an agreement to convey a strip of land in fee for railroad purposes was held to convey an easement only. A deed granting to a railroad company 'the right of way for so much of said railroad, being 80 feet wide, as may pass through the following land,' was held to convey merely an easement, an incorporeal hereditament, the fee remaining in the grantor. *Railway Co. v. Geisel*, 119 Ind. 77 (21 N. E. Rep. 470). 'A grant of a "way" or the privilege of a highway does not convey the soil or any interest

in it.' Jones, Easem, § 208. 'A grant of a right of way to a railroad company is the grant of an easement merely, and the fee remains in the grantor.' Id. § 211. 'The grant of a right of way does not convey the soil.' Home v. Richards, 4 Call, 441 (2 Am. Dec. 574). 'If the deed does not in terms convey the land or soil covered by the way, but merely a way in connection with the land conveyed, the grantee takes no interest or estate in the soil of such way.' Jones, Easem. § 207. 'The conveyance of a right of way conveys an easement only.' 2 Lewis, Em. Dom. § 291.

As antagonizing this position as to the effect of the words 'right of way,' we are cited the cases of *Railway Co. v. Rayl*, 69 Ind. 429, and *Railway Co. v. Titterington*, 84 Tex. 218 (19 S. W. Rep. 472; 31 Am. St. Rep. 39), and *Keener v. Railroad Co.*, (C. C.) 31 Fed. Rep. 126. These cases do not apply. No question arose in them as to the real title conferred, or the right to take minerals. In the first case the question was the width of the right of way; in the second, whether the title passed so as to be beyond defeasance by the condition of the deed; and, in the third, as to whether the land or only the track should be taxed to the company. In the second case we do not know the words of grant or the subject granted, and the third was not a grant, but a condemnation. It is said that we announced contrary law in *Watts v. Railroad Co.*, 39 W. Va. 204 (19 S. E. Rep. 524; 23 L. R. A. 674; 45 Am. St. Rep. 894), by simply saying, 'The grant in this case was of the fee of the land.' So it was there, the land itself being granted, but not in this case. This was said in speaking of damages to the owner's private way. It did not involve the right of the railroad company to take oil or other minerals. Whether, when a grant is in words a grant of the very land itself for the construction of a railroad, the company can take oil or other minerals not necessary in the operation of the road, is not involved in this case, and we do not decide that point, though, speaking for myself, I think it cannot do so, to the prejudice of the grantor. In this case the question is whether the company can, under a deed granting, not the land, but a right of way, take oil to the harm of the grantor's other land. It will be noted that most of the deeds above referred to contained language of actual grant of actual land, and yet the presence of the words 'right of way,' or the declaration that the grant was for railroad purposes, induced the courts to hold that they conferred only an easement. The agreement in this case does not grant land in its granting

clause, but only right of way. Another very influential consideration is that the agreement declares that the purpose of the concession is for the construction of a railroad, which shows that merely an easement was intended. Where the granting clause declares the purpose of the grant to be a right of way for a railroad, the deed passes an easement only, though it be in the usual form of a warranty deed. *Jones, Easem.* § 212. Where the deed grants all the grantor's right, title, and interest to land, 'for use of a plank road,' only an easement passes. *Robinson v. Railroad Co.*, 59 Vt. 426 (10 Atl. Rep. 522). So where the conveyance was for a park. *Flaten v. City of Moorhead*, 51 Minn. 518 (53 N. W. Rep. 807; 19 L. R. A. 195). A grant of right of way for 'all purposes connected with the construction, use and occupation of said railway' was held not to pass a fee or give right to take sand to build a roundhouse. *Vermilya v. Railway Co.*, 66 Ia. 606 (24 N. W. Rep. 234; 55 Am. Rep. 279). Thus, it seems clear that the face of the agreement plainly speaks the grant of a mere easement, without ambiguity. But suppose we could say that the instrument is ambiguous. When we place ourselves in the situation of the parties, and reflect that they meant only a contract for the right of way, that such was the sole design of the company, that the paper so declares on its face, that such was the moving purpose, that the company did not dream of acquiring oil, or of using the land in the oil business, we cannot hesitate for a moment to conclude that merely a right of way was in the contemplation of the parties. We need no oral evidence for this; the writing itself so speaks. The law allows—requires—us to take into consideration what all these circumstances show must have been the purpose of the parties. *Nash v. Towne*, 5 Wall. 689 (18 L. Ed. 527); *Jones, Easem.* § 289; *Barlow v. Railroad Co.* 29 Ia. 276; *Robinson v. Railroad Co.*, 59 Vt. 426 (10 Atl. Rep. 522).

But great and decisive import is given by counsel for the railroad company to the clause whereby Uhl agreed to 'execute in due form of law a deed conveying to said company in fee simple the land hereinbefore described.' Now, this is to be explained on two plausible theories consistent with our holding. One is that the parties regarded the instrument as only a preliminary executory agreement, and contemplated a formal deed to more fully describe the strip of land, or with other consistent provisions. This is shown by the fact that they gave the name of 'agreement' to the paper, and also by the words

'in due form of law.' So viewing it, we would say that this provision looked forward to a deed for just what the agreement had already in its vital clause stipulated for. We would not make this clause enlarge the estate when both clauses can stand together in harmony. If there should be a future deed, it is true it would have to be in fee simple,—that is, convey a fee in an easement, a right of way in fee simple, an incorporeal hereditament; for, 'a fee simple may be had in incorporeal as well as corporeal hereditaments,' by elementary law. 1 Washb. Real Prop. 82. This document contains the word 'grant,' and is all-sufficient to pass title; but it was thought that a more formal instrument might in time be wanted, and it was for caution put in,—that is, the clause in question,—as is frequently done. In conveyancing it is common, and is called a covenant for further assurance. The second theory is that if this paper were viewed as a conveyance, not simply as an executory instrument, then this clause would be regarded as the old common-law covenant of further assurance, meaning that if any further deed should be needed to further or better assure what the instrument had already, in its granting clause, conferred, by reason of some informality, it would be executed. Discussing this covenant, Rawle, Cov. 104, says that the purchaser's right under it may depend on the estate conveyed, and that, when the estate conveyed is a limited estate, the covenant will not require the conveyance of a greater estate. Thus, as the prior clause, the vital operative one, had only given a right of way, this clause only contemplated a further deed for that. Our Code (Chapter 72, § 18) limits such a covenant to the land conveyed in the granting clause. This is consistent with the well-known law that a warranty is a dependent covenant, and applies only to the estate granted, and cannot increase it. *Hull's Adm'r v. Hull's Heirs*, 35 W. Va. 155 (13 S. E. Rep. 49; 29 Am. St. Rep. 800). We cannot say that one clause concedes one estate; the other, another. If the intention was to pass the corpus, why not make the instrument do it then? Covenants for further assurance apply only to the estate granted. We must look at the whole paper to see what it means, and cannot disregard the first clause, passing only a right of way, and make the other clause pass the soil and all minerals in it. In deeds the first clause prevails generally over the later, and, surely, a later clause of mere further assurance would not emasculate and predominate over the prior granting clause, but just the reverse. As to wills the rule has

ever been that, regardless of form or orderly parts, we must look at the real intention; but this has not been the case in the construction of deeds. Deeds have orderly parts, technical words of precise legal signification, and in times gone by those parts and words, and the strict rule of construction of them, have been rigorously observed, often defeating the manifest intention. Modern construction, however, has leaned towards the intention, overriding mere form and technical words, and nowadays it may be said that the intention must rule the construction in deeds as well as in wills. *Humphrey v. Foster*, 13 Grat. 653; *Mauzy v. Mauzy*, 79 Va. 537, and *Lindsey v. Eckels*, 99 Va. 668 (40 S. E. Rep. 23), show this to be the rule in Virginia; and *Hurst v. Hurst*, 7 W. Va. 289; *Goldsmith v. Goldsmith*, 46 W. Va. 426 (33 S. E. Rep. 266); *McDougal v. Musgrave*, 46 W. Va. 509 (33 S. E. Rep. 281); and *Bank v. Green*, 45 W. Va. 171, 174 (31 S. E. Rep. 260); show this to be the rule in West Virginia. The supreme court of New Hampshire, in *Webster v. Atkinson*, 4 N. H. 21, says: 'The construction of a deed must be made upon the entire instrument, and be such that the whole deed and every part of it may take effect, and one part must be construed by another, so that all parts may agree.' Such is the general law of the country. 1 Devl. Deeds, § 836; *Bodine's Adm'rs v. Arthur*, 91 Ky. 53 (14 S. W. Rep. 904; 34 Am. St. Rep. 162); *Bassett v. Budlong*, 77 Mich. 338 (43 N. W. Rep. 984; 18 Am. St. Rep. 404). For instance, deeds generally require the word 'grant,' or the words 'bargain and sell,' or some technical word suitable to the character of the conveyance. Such is formal conveyancing. But the word 'convey' is now held to be equivalent to the word 'grant,' even at common law. *Chapman v. Charter*, 46 W. Va. 769 (34 S. E. Rep. 768); *Lambert v. Smith*, 9 Or. 185; *Patterson v. Carneal's Heirs*, 3 A. K. Marsh. 618 (13 Am. Dec. 208); 4 Kent. Comm. 491; 2 Lomax, Dig. 81; 2 Minor, Inst. 780. Kent there says that any word to show intention will do. See *Flaten v. City of Moorhead*, 51 Minn. 521 (53 N. W. Rep. 807; 19 L. R. A. 195). As before stated, we must look at the whole paper, and not allow the words 'fee simple' to defeat the plain intentions spoken by the recital of the deed as to the occasion and aim of the deed, the construction of a railroad, and the language of the clause granting right of way. If there were repugnancy in the parts of the instrument specified above, we would be compelled by law to make 'repugnant words yield to the purpose of the grant, where such purpose is clearly

ascertained from the premises of the deed.' *Goldsmith v. Goldsmith*, 46 W. Va. 426 (33 S. E. Rep. 266). The effect of language in a deed is to be gathered from the whole of it, and not disjointed parts, so as to give effect to the whole. The intention of the grantor, as derived from the deed itself, should be sought after, and, if discovered, should be carried into effect, if it can be done consistently with rules of law. *Allemong v. Gray's Adm'r*, 92 Va. 216 (23 S. E. Rep. 298); *Hurst v. Hurst*, 7 W. Va. 289; 17 Am. & Eng. Enc. Law (2d Ed.) 7. But in fact there is not the slightest conflict between the clauses in question; and this for the reason that, reading the words 'fee simple' with other parts of the paper, they mean a conveyance of a fee simple right, an easement in fee simple, an incorporeal fee. The authorities above given are ample to sustain this decision; but we could dispense with them, and cite one single case as conclusively and fully supporting us, because it is a decision of our highest court upon an exactly similar deed to the same company. Pugh made a similar deed or agreement, and the railroad company leased its right of way land to Logan for the purpose of boring for oil, and he was boring for oil when Lockwood, to whom the Pugh land had been leased for oil purposes, asked an injunction against Logan in the circuit court of the United States for the district of West Virginia to restrain Logan from operating for oil upon the right of way land, and thereby draining the adjoining land. The circuit court denied the injunction, and the case went to the circuit court of appeals for the Fourth circuit, which reversed the circuit court, and held that the deed intended to pass only a right of way, and that the company took only an easement in the land; that, the agreement having been prepared by the railroad company, any doubt as to its true meaning should be solved adversely to the company, and not be construed most favorably to the grantee under the general rule; and a covenant to execute a deed conveying the land in fee simple being a dependent covenant, and the estate or interest conveyed by the agreement being limited to an incorporeal hereditament, the operation of said covenant is necessarily restricted by the granting clause, and cannot require the conveyance of a greater estate. *Lockwood v. Railroad Co.*, 43 C. C. A. 202 (103 Fed. Rep. 243). Application was made to the United States Supreme Court for a certiorari, but it was refused. 180 U. S. 637 (21 Sup. Ct. Rep. 920; 45 L. Ed. 710)."

Sec. 657. Grants of right of way—Conditions, covenants and limitations. A condition in a conveyance of land to a railroad company, reciting that it was made "for and in consideration of a depot at Spring Hill, or in the vicinity, by December, 1898,—otherwise this deed is to be null and void," is not complied with by the establishment of a mere stopping place, without platforms or buildings, where persons and freight were received and discharged. *Arkansas Cent. R. Co. v. Smith*, Ark. (71 S. W. Rep. 947). Where a street railway company, which as a part of the consideration of a grant of a right of way over premises, had agreed with the owner thereof to grade and pave and curb, for the use of the owners and occupants of the premises, a roadway on the said right of way, outside of and along its tracks, afterwards abandons its road before laying any tracks on the premises, on account of failing to procure a municipal franchise, the owners are entitled to nominal damages only. *Hays v. Wilkinsburg & E. P. St. Ry. Co.*, 204 Pa. St. 488 (54 Atl. Rep. 322). A deflection of a few feet on some part of its line, of a railroad, does not operate to work a forfeiture of a grant of a right of way to the railroad company stipulating for a reversion to the grantor upon "the failure or abandonment of the enterprise by the grantee or its successors." *Dickson v. St. Louis & K. R. Co.*, 168 Mo. 90 (67 S. W. Rep. 642). A stipulation in a grant to a railroad company of a right of way over farm lands by which the company covenants "to make and maintain the necessary fences on both sides of said tract of land, which shall be built before the work of grading on said track is commenced, and shall provide the party of the first part with a suitable and convenient road crossing, across the track of said railway where the party of the first part may direct," creates an easement appurtenant to the adjoining land which passes to those succeeding to the grantor's title, though the word "heirs" was not used; and where the company after the location and construction of the crossing, changes the grade of its road it must provide the necessary means for continuing the use of the crossing though it necessitates great expense. *Speer v. Erie R. Co.*, 64 N. J. Eq. 601 (54 Atl. Rep. 539). As to damages recoverable for breach of covenant by railroad company to construct and maintain necessary cattleguards, see *Douglass v. Ohio River R. Co.*, 51 W. Va. 523 (41 S. E. Rep. 911).

Sec. 658. Use of right of way. Under Ill. Const. 1870, art. 2, § 3, where land is condemned for railroad purposes, only an easement is taken, and the fee remains in the original owner, who may use the land for every purpose not incompatible with the use for which it has been appropriated by the railroad company, and the property reverts to the original owner on abandonment by the railroad company. *Chicago & E. I. R. Co. v. Clapp*, 201 Ill. 418 (66 N. E. Rep. 223). The right of an owner of land over which a railroad has an easement for right of way, to the use and possession of the land covered by the right of way for any purpose not incompatible with the purposes for which the easement was granted or acquired, does not give him the right to enclose with a permanent fence a part of such right of way, under an exclusive claim of right to use and occupy it, and the railroad company may maintain an action for the removal of such fence. *Southern Ry. v. Beaudrot*, 63 S. C. 266 (41 S. E. Rep. 299). The erection and maintenance by a railroad company of a hotel and eating house on lands granted to it "for all legitimate railroad, depot, and warehouse purposes," is not a use repugnant to the grant, where such a use is reasonably necessary for the accommodation of its passengers and employes, although it may furnish accommodations for persons in no way connected with the road. *Abraham v. Oregon & C. R. Co.*, 41 Or. 550 (69 Pac. Rep. 653). See opinion for review of authorities on this subject.

Sec. 659. Farm crossings over or underneath right of way. Where the parties to the grant of a railroad right of way, by their acts for more than forty years, have construed it as giving the grantor the right to an overhead crossing, such right cannot be denied, and Pa. Laws 1838, p. 464, § 11 containing certain prohibitions against the construction of a crossing on a railroad right of way does not apply where the right to the crossing is reserved by the grant of the right of way. *Mt. Pleasant Coal Co. v. Delaware, L. & W. R. Co.*, 200 Pa. St. 434 (50 Atl. Rep. 251). Where a railway company, upon a trial in the district court on an appeal from an award under proceedings instituted by such railway company to condemn a right of way, which trial is held after the construction of the railroad, offers and causes to be admitted in evidence the map and profile of its line, showing an opening or undergrade crossing of value to the land in controversy, and where, upon such trial, the railway company asks and procures to be given to the

jury an instruction that the landowner has the right to maintain any crossing under the track of the railroad upon such right of way "when such undergrade crossing in no wise interferes with the [railway company's] use of such track or tracks for the purpose of operating and carrying on its business thereon," such railway company or its successor may not close up such undergrade crossing without the consent of the landowner, and, if it does so, damages may be recovered therefor by such owner. *Atchison, T. & S. F. R. Co. v. Davenport*, 65 Kan. 206 (69 Pac. Rep. 195). For construction of particular contract for crossing, see *Speese v. Schuylkill River E-S. R. Co.*, 201 Pa. St. 568 (51 Atl. Rep. 316).

Sec. 660. Crossing of railroads, streets and highways.

The general power conferred on the city of Indianapolis, by Burns' Ind. Rev. Stat., § 3794, to declare and abate nuisances, and to require railroad companies to change the grade and crossings of their respective roads, and to raise or lower their tracks in order to conform to any grade which may be established by ordinance, does not confer on the city power to pass an ordinance requiring all railroads operating within the corporate limits to construct elevated tracks over all crossings within a prescribed district, without regard to the conditions or circumstances of any particular crossing. *State v. Indianapolis Union Ry. Co.*, 160 Ind. 45 (66 N. E. Rep. 163; 60 L. R. A. 831). Burns' Ind. Rev. Stat., §§ 5468a-5468e; Laws 1901, p. 461, construed and applied—rights of interurban street railroads as to crossing steam railroad tracks—proceedings to establish crossing. *Wabash R. Co. v. Ft. Wayne & S. W. Traction Co.*, 161 Ind. 295 (67 N. E. Rep. 674). Mass. Stat. 1890, ch. 428; 1891, ch. 262; 1892, ch. 374; 1895, ch. 491, construed and applied—abolition of grade crossing—petition—discontinuance of proceedings. *In re Directors of New York, N. H. & H. R. Co.*, 182 Mass. 439 (65 N. E. Rep. 815). Mo. Rev. Stat. 1899, §§ 1035, 1268 construed and applied—right of one railroad company to cross track of another—appointment of commissioners and conclusiveness of their decision as to point and manner of crossing. *State v. Deering*, 173 Mo. 492 (73 S. W. Rep. 485). A statute (N. Y. Laws 1850, ch. 140, re-enacted in Railroad Laws 1890, ch. 565) giving to "every railroad corporation" certain rights as to crossing, intersecting, joining or uniting with other railroads, is held to entitle electric railway companies to track connections with intersecting steam

roads. *Stillwater & M. St. Ry. Co. v. Boston & M. R. Co.*, 171 N. Y. 589 (64 N. E. Rep. 511; 59 L. R. A. 489).

Sec. 661. Railroad crossing highway or street—Mandamus to compel compliance with statute. Construing and applying *Burns' Ind. Rev. Stat.*, § 5153, subd. 3, which authorizes a railroad company to construct its road upon or across a highway so as not to interfere with the free use of the same, in such manner as to afford security for life and property, and requires such company to restore the "highway thus intersected to its former state, or in a sufficient manner not to unnecessarily impair its usefulness." it is held that when a railroad intersects a public highway, it is the duty of the railroad company to construct the crossing over its road, and to keep the same in safe and good condition; and the courts may enforce a compliance with the statute by mandamus against the railroad company directing particularly what should be done in order for a crossing to comply with the statute. *Chicago, I. & L. Ry. Co. v. State*, 158 Ind. 189 (63 N. E. Rep. 224). Construing this statute in connection with § 5172a, the same holding is made in reference to a railroad crossing over city streets. *Chicago & S. E. Ry. Co. vs. State*, 159 Ind. 237 (64 N. E. Rep. 860). A railroad company is required not only to construct its crossings over highways, as provided by § 5153, subd. 5, but it must so maintain them, even over highways established after the construction of the road; and in a mandamus proceeding brought after the establishment of a highway across the track of a railroad company to compel a company subsequently succeeding to its rights to comply with the statute, such company cannot set up a claim for damages on account of the expense it will incur by reason of complying with the statute, such a claim being a matter for adjudication in the proceedings for the establishment of the highway; and this is true although the company owning the railroad at the time of the highway proceeding had no actual notice thereof but only the constructive notice provided for by the statute. *Baltimore & O. S. W. R. Co. v. State*, 159 Ind. 510 (65 N. E. Rep. 508).

In the case first cited in this section, *Chicago, I. & L. Ry. Co. v. State*, 158 Ind. 189 (63 N. E. Rep. 224), the court say: "Appellant insists that the provision in the statute requiring the company to restore the highway to its former state, 'in a sufficient manner not to unnecessarily impair its usefulness,' gives such company 'the right to use a discretion in such mat-

ter, which cannot be controlled by the courts; that, the company having such discretion, the court cannot, by a writ of mandamus, require the company to restore the highway at a particular point or in a particular manner.' When the company constructs and maintains a highway crossing as required by statute, mandamus will not lie to compel it to construct the crossing in a different manner; but when the crossing is constructed in such a way as to unnecessarily impair the usefulness of the highway, either by interfering with its free use, or not affording security for the life or property of those using the same, then mandamus will lie to compel the company to perform its duty as set forth in the statute. The special finding shows that the appellant did not restore said highway to its former state at said crossing, or put it in such condition as not to unnecessarily impair its usefulness, but so constructed it as to render the same dangerous to life and property, and so as to interfere with its free use. The relator, representing the public, did not approve the plan adopted and carried out by appellant in the construction of said crossing. On account of this disagreement the relator brought this action to compel the appellant to construct the same according to the requirements of the statute. Neither of the parties can determine the matter in dispute. Such questions, when there is a disagreement, are for the courts to decide. *People v. Dutchess & C. R. Co.*, 58 N. Y. 152, 162, 163. If a peremptory writ were issued, commanding generally a restoration of such crossing to its original state, or so as not to unnecessarily interfere with the usefulness of the highway, appellant would again be left to its own plans of doing the work; and it might be found, after the work was done, that the requirements of the statute had for a second time not been complied with. In such a case the court should direct particularly what should be done in the construction of the crossing, so as not to impair its usefulness. 19 Am. & Eng. Enc. Law (2d Ed.) 874; Elliott, R. R. § 1106; *People v. Dutchess & C. R. Co.*, 58 N. Y. 152, 162, 163; *People v. New York Cent. & H. R. R. Co.*, 74 N. Y. 302; *People v. Northern Cent. R. Co.*, 164 N. Y. 289 (58 N. E. Rep. 138); *Allen v. Railroad Co.*, 151 N. Y. 434 (45 N. E. Rep. 845); *State v. Minneapolis & St. L. R. Co.*, 39 Minn. 219 (39 N. W. Rep. 153); *State v. Minnesota Transfer Ry. Co.*, 80 Minn. 108, 114, 115 (83 N. W. Rep. 32; 50 L. R. A. 656); *State v. St. Paul & D. R. Co.*, 75 Minn. 473 (78 N. W. Rep. 87); *State v. St. Paul, M. & M. Ry. Co.*, 35 Minn. 131 (28 N. W. Rep. 3;

59 Am. Rep. 313); *State v. St. Paul, M. & M. Ry. Co.*, 38 Minn. 246 (36 N. W. Rep. 870). It is said on this subject in *Elliott, R. R.* § 1106, that: "The railroad company, however, has no discretion whether it will or will not restore the highway; and if it "elects a manner that is not effectual, and the act remains substantially undone," it is still "under liability to do it." The discretion is ministerial, and "the act of restoration must be done." If the company has adopted an ineffectual mode, "the court will and should point out to it in what it has failed, and direct it particularly what it must do so as not to fail again." *State v. Minneapolis & St. L. Ry. Co.*, 39 Minn. 219 (39 N. W. Rep. 153); *People v. Dutchess & C. R. Co.*, 58 N. Y., 152, approved in *City of Moundsville v. Ohio River R. Co.*, 37 W. Va. 92 (16 S. E. Rep. 514; 20 L. R. A. 151, 165, 166)."

Sec. 662. Abandonment of right of way. The abandonment of the easement of a railroad in a right of way over land inures to the benefit of the owner of the land at the time of the abandonment, if not reserved to the original owner. *McLemore v. Memphis & C. R. Co.*, Tenn. (69 S. W. Rep. 338). A right of way granted to a railroad company by a deed stipulating that if such company "or its assigns, shall at any time hereafter cease permanently to use said road so to be constructed, and the same shall be abandoned, or the route thereof changed so as not to be continued over said premises, then and in that case said land thereby granted shall revert to the said grantors," is abandoned so as to work a reversion of the land to the grantor where the only use made of the part of the track on such land is occasionally to shove an old worn-out car thereon and leave it there for months at a time; and eight years of such nonuse would effect a reversion to the grantor without the stipulation in the deed, under Ia. Code, § 2015. *Gill v. Chicago & N. W. Ry. Co.*, 117 Ia. 278 (90 N. W. Rep. 606). For case discussing what constitutes an abandonment of a railroad right of way, and determining particular questions as to admissibility of evidence to show such abandonment, see *Chicago & E. I. R. Co. v. Clapp*, 201 Ill. 418 (66 N. E. Rep. 223).

RIPARIAN OWNERS.

BECKER v. HALL.

(116 Iowa 589)

What constitutes a valid appropriation of ice on public waters—
Validity of custom. A valid appropriation of ice on public waters so as to give one a prior right thereto can only arise when the ice is fairly merchantable, and when he who seeks to appropriate it has the present intention and ability to proceed at once to the harvest thereof, and does so proceed with reasonable diligence. Neither the staking of the banks of a stream before it has frozen nor the marking, staking and cleaning of ice of insufficient thickness for harvesting amount to a valid appropriation; and a local custom to the contrary can not be sustained.

SHERWIN J.

Sec. 663. What constitutes a valid appropriation of ice on public waters. The ice field in controversy was located in the government canal at Keokuk. The canal is public water, and the right to take ice therefrom is a common right. One member of the general public has the same right to ice formed upon the public waters as has another, until there has been an actual appropriation of such ice. *Brown v. Cunningham*, 82 Ia. 517 (48 N. W. Rep. 1042; 12 L. R. A. 583). What will amount to such an appropriation is the controlling question in this case, and the authorities are not in entire harmony thereon. It has been held "that an appropriation of ice upon these waters is made by surveying, marking, and staking off the ice, if unappropriated by others, and expending money to preserve it." Gould, *Waters* (3d Ed.) § 191; *Wood v. Fowler*, 26 Kan. 682 (40 Am. Rep. 330); *Hicky v. Hazard*, 3 Mo. App. 480. In *Hicky v. Hazard*, supra, the plaintiff had inclosed a field of ice with marked stakes, and by plowing around it, and

had maintained constant possession until the ice was fit to harvest, when he and his men were driven away, and the ice cut and taken by the defendant. It was held that the plaintiff could recover for the ice. In the Kansas case an injunction was asked restraining the defendant from taking ice opposite and next to the plaintiff's land. The question of priority of appropriation was not involved. On the other hand, it is held in Massachusetts and Maine that the mere marking or staking off of ice fields does not constitute such an appropriation as will vest the right to the ice. In *Barrett v. Ice Co.*, 84 Me. 155 (24 Atl. Rep. 802; 16 L. R. A. 774), the plaintiff was the lessee of a portion of the shore of a great pond. In the fall he dug a ditch from the pond to the upland for the purpose of floating ice therein. On the night of January 27th following, he run a line of marked stakes around the field he proposed to harvest. He owned some tools and ice houses, which he had not, however, used for several years. The defendant was in the ice business, and had the year before cut the ice on the same water. Late in the fall, but before the ice began to form, it cut out and removed the lily pads which were in the pond; it kept the ice clear of surface water and of snow, and had worked thereon before the plaintiff set his stakes. About the last of January it went upon the pond and commenced cutting and hauling ice therefrom, and continued to do so. An action of trespass was brought against the company by the plaintiff. The court says: "The only acts looking" towards an appropriation "were his digging the ditch, his nocturnal erection of stakes and surveying, and the written notice. He scraped no snow; he removed no lily pads; he ignored the surface water; and made no preparation whatever to cut the ice, though 12 or 14 inches thick." The action was dismissed. In *People's Ice Co. v. Davenport*, 149 Mass. 322 (21 N. E. Rep. 385; 14 Am. St. Rep. 425), the plaintiffs scraped the snow from the ice, and put down stakes to show where the lines were. They then suspended operations for several days. The court says: The plaintiffs "cannot * * * appropriate a part of the pond by scraping it or setting up stakes and exclude the public therefrom. The ice, until it is cut, remains a part of the realty, and no one has any exclusive title to it. Upon the facts of the case at bar we are of opinion that the plaintiffs had no title to or possession of the ice cut by the defendant which enables them to maintain an action of tort in the nature of trover." See, also, *Rowell v. Doyle*, 131 Mass. 474. It is apparent from the examination

of the authorities that no rule can be adopted that will exactly fit all cases, but we think there may be deduced from them a rule that will do substantial justice to all. We believe the true rule to be that there can be an appropriation of ice formed upon public waters only when the ice is fairly merchantable, and when he who seeks to appropriate it has the present intention and ability to proceed at once to the harvest thereof, and does so proceed with reasonable diligence. No rights can be acquired by staking the banks of a stream before it has frozen, as was done in this case by both parties; for, if such rule were established, the public could be forever excluded from participation in such public benefits. Nor can the marking, staking, or cleaning ice not yet of sufficient thickness for harvesting amount to a legal appropriation thereof. In addition to all this, there must be actual possession of the field when fit to cut, coupled with the present intent and ability above stated. We find the facts to be in the case at bar that the plaintiffs were in actual possession of the field, and harvesting the ice, when interfered with by the defendants, and that the defendants had not, therefore, legally appropriated such ice.

Sec. 664. What constitutes a valid appropriation of ice on public waters—Validity of custom. A custom regarding the appropriation of ice along the Mississippi river is pleaded, and evidence introduced in support thereof. The evidence does not, in our judgment, support the plea; but, if it did, it would be clearly unreasonable, and in conflict with public rights, and for this reason should not be sustained. *Freary v. Cooke*, 14 Mass. 488; *Coal Co. v. Sanderson*, 94 Pa. 302 (39 Am. Rep. 785); *Dempsey v. Dobson*, 184 Pa. 588 (39 Atl. Rep. 493; 40 L. R. A. 550; 63 Am. St. Rep. 809); *Attorney General v. Tarr*, 148 Mass. 309 (19 N. E. Rep. 358; 2 L. R. A. 87); *East Birmingham Land Co. v. Dennis*, 85 Ala. 565 (5 So. Rep. 317; 2 L. R. A. 836; 7 Am. St. Rep. 73); *Susquehanna Fertilizer Co. v. White*, 66 Md. 444 (7 Atl. Rep. 802; 59 Am. Rep. 186); *Walker v. Transportation Co.*, 70 U. S. 150 (18 L. Ed. 172; 13 L. R. A. 438, note).

The judgment of the district court is affirmed.

EPITOME OF CASES.

Sec. 665. Title to submerged land upon disappearance of water. Where, after submergence of land, the water dis-

appears therefrom, either by gradual retirement or by the elevation of the land by natural or artificial means, and its identity can be established by reasonable marks, or by situation, extent, quantity, or boundary lines, the proprietorship returns to the original owner. *Hughes v. Birney's Heirs*, 107 La. 664 (32 So. Rep. 30). The court say: "In Gould, Waters (2d Ed.), § 158, it is said: 'If navigable waters owned by the state suddenly encroach upon private lands adjoining, and there are marks by which their limits can be determined, the title to the soil thus covered remains in the former owner, and upon recession of the water it is restored to his property.' The author cites many authorities in support of this proposition, among them Sir Mathew Hale's *De Jure Marais*; Woolrych, *Waters*, 22, 37; and *Mulry v. Norton*, 100 N. Y. 426 (3 N. E. Rep. 581; 53 Am. Rep. 206). In the case last referred to it was held that: 'If, after a submergence, the water disappears from the land either by its gradual retirement or the elevation of the land by natural or artificial means, the proprietorship returns to the original owner. No lapse of time during which the submergence has continued bars the right of the owner to enter upon the land reclaimed, and assert his proprietorship, when the identity can be established by reasonable marks, or by situation, extent of quantity, and boundary on the firm land.' See, also, *Angell, Tide Waters* (1st Ed.) 77; *City of St. Louis v. Rutz*, 138 U. S. 226 (11 Sup. Ct. Rep. 337; 34 L. Ed. 941); *Nebraska v. Iowa*, 143 U. S. 359 (12 Sup. Ct. Rep. 396; 36 L. Ed. 186)."

Sec. 666. Title and rights of riparian owners. As against a mere trespasser, grantees on opposite sides of a non-navigable stream claiming under grant from the government, made with reference to the plat of the survey, which shows a meandered line along the bank, have the right to unsurveyed islands in the stream. *McBride v. Whitaker*, Neb. (90 N. W. Rep. 966). Riparian rights are property and cannot be taken without compensation, even for a public use; and any actual and material interference with such rights, which causes special and substantial injury to the owner, is a taking of his property. *City of Mansfield v. Balliett*, 65 O. St. 451 (63 N. E. Rep. 86; 58 L. R. A. 628). An upper riparian owner cannot be deprived of his natural right to use the waters of a lake for bathing, without compensation, because a city as a lower riparian owner draws its water supply from such lake. *People v. Hulbert*, 131 Mich. 156 (91 N. W. Rep. 211). See opinion

for exhaustive discussion of the natural rights of upper and lower riparian owners. The fact that a pier extends into the ocean below the line of low water mark does not deprive the owner thereof or his lessee of the right to control its use, as against one who bases his right to use it solely upon the claim that it was a public pier. *Coney v. Brunswick & F. Steamboat Co.*, 116 Ga. 222 (42 S. E. Rep. 498). A riparian owner cannot be enjoined from cutting trees along the banks of a stream, although it increases evaporation and lessens the quantity of water; but he may be enjoined from felling the trees into the stream, it being made to appear that the waters were injuriously affected thereby. *Fisher v. Feige*, 137 Cal. 39 (69 Pac. Rep. 618; 59 L. R. A. 333; 92 Am. St. Rep. 77). A riparian owner's right to use the waters of a stream does not allow him to erect dams across the same whereby the water is spread out and lost by evaporation and absorption, so as to injure another riparian proprietor below; nor can he claim this right by reason of the fact that the source of the stream is a spring situated upon his own land. *Barneich v. Mercy*, 136 Cal. 205 (68 Pac. Rep. 589). The riparian rights of the state owning lands bordering on a stream do not extend so far as to authorize it to supply with water from the stream a sufficient amount to accommodate and meet the necessities of irrigation, cooking, laundry, sanitation, etc., for such institutions as the state penitentiary and the asylum for the insane, where from 1300 to 1500 persons are kept in constant confinement, the latter institution being located from a quarter to a third of a mile distant from the course of the stream. *Salem Flouring Mills v. Lord*, 42 Or. 82 (69 Pac. Rep. 1033). One over whose lands there is a natural, well-defined channel or ravine having its head in a natural depression in the bank of a river, and through which water from the river is accustomed to flow during the irrigating season, has the rights of a riparian owner on a natural stream which he may protect by injunction. *Mace v. Mace*, 40 Or. 586 (67 Pac. Rep. 660). Where there are upper and lower proprietors upon a natural running stream, both having manufactories propelled by the water of the stream, and the water is insufficient to supply the needs of both, each one has a right to the reasonable use of the water, considering all the circumstances. In such cases the water of the stream should be so divided and used that each proprietor shall bear his fair proportion of the loss caused by the shortage of water, considering all the circumstances of the case. *City of Canton v. Shock*, 66 O. St. 19 (63

N. E. Rep. 600; 58 L. R. A. 637; 90 Am. St. Rep. 557). For exhaustive collation of authorities on "Right to fish," see 60 L. R. A. 481-523.

Sec. 667. Right of riparian owner to increase flow of stream by drainage of his land. The restriction upon a riparian owner's right to divert the waters from a stream does not operate to prevent his accelerating and increasing such waters by construction of drains upon his lands, although others are damaged by his doing so. *Mizely v. McGowan*, 129 N. C. 93 (39 S. E. Rep. 729; 85 Am. St. Rep. 705). The court say: "We are aware that great hardship may sometimes occur from the unlimited right of increase and acceleration, and that there are some authorities limiting it to the capacity of the natural outlet; but we must adhere to the rule as the result of our deliberate judgment. However short it may fall as a theoretical definition of ideal right, we can frame none better that is capable of practical application. Its limits are clearly defined by the natural landmark of the watershed, which, seen of all men, renders it easy of application and capable of definite proof. Any other rule would prevent the drainage of large bodies of swamp lands of great natural fertility and capable of the highest degree of improvement, but now worse than useless. They will eventually be needed to support an ever-increasing population, and to shut them up indefinitely as the mere homes of disease is repugnant to the highest principles of public policy and of private right. Suppose the natural capacity of the water course was made the test of the rule; it would be so extremely difficult of application as practically to destroy its value. What is the natural capacity of a stream? Is it measured at low water or at high water? Almost any stream can carry off whatever water may be made to flow into it in dry weather, or perhaps even in ordinary times. On the contrary, the clearing up of our lands is having the double effect of greatly accelerating the flow of water, and at the same time filling up our streams with sand, so that very few of them can now carry the water naturally flowing into them after heavy rains. Again, suppose that the upper tenant were compelled to regard the natural capacity of the stream; how far down would this limitation extend? Naturally many others would drain into the same stream, so that the landowner near its mouth would get the accumulated waters of all those above him. In case of injury, how would he apportion his damages, and where would the liability of each

tortfeasor begin and end? These questions, it seems to us, would severely tax the utmost ingenuity of the courts, and leave the jury in such state of perplexity as to seriously endanger their intelligent determination of the issues."

Sec. 668. Riparian title and rights on stream having two sets of banks. In determining what are riparian lands and the rights incident on a stream having two sets of banks, the high banks will be regarded as forming the true boundary thereof. *Ventura Land & Power Co. v. Meiners*, 136 Cal. 284 (68 Pac. Rep. 818; 89 Am. St. Rep. 128). The court say: "According to the most approved definitions, the banks of rivers or other water courses are 'those boundaries * * * which contain their waters at their highest flow;' or, as otherwise expressed by the same judge, they are 'the fast land which confines the water of a river in its channel or bed, in its whole width,'—i. e., as determined by its highest flow. *Howard v. Ingersoll*, 13 How. 415, 417 (14 L. Ed. 189). This accords with the definition given in *Stone v. City of Augusta*, 46 Me. 137, to-wit: 'By this term is understood what contains the river in its natural channel, when there is the greatest flow of water,' and also the definition in the Digest, cited in *Ang. Water Courses*, § 24, note 3, viz: 'That is considered the bank which contains the river when fullest.' This definition seems to have been generally accepted. *Kin. Irr.* § 39, and note 43; *Gould, Waters*, §§ 41, 45, and notes; *Long, Irr.* § 32; *Ang. Water Courses*, § 24, and notes cited supra; *Id* § 4; *Palmer v. Waddell*, 22 Kan. 355, and *Earle v. De Hart*, 12 N. J. Eq. 280 (72 Am. Dec. 395), there cited; *Sparks Mfg. Co. v. Town of Newton*, 57 N. J. Eq. 383, 384 (41 Atl. Rep. 392). In the case last cited, it was said: 'I find it quite impossible to distinguish, in the matter of exclusive title and riparian right of user, between what counsel for the defendant classes as "freshet of flood water" and other water. They are all parts of the running stream, and, as such, become subject to the right of user by the riparian owner;' and further to the same effect. The principle thus established is peculiarly appropriate to this state, where the changes in rainfall from year to year may be said to be periodical. The rule is, however, to be understood as qualified by the principle that 'in general, in order to constitute a water course, the channel and banks formed by the flowing of the water must present to the eye * * * the unmistakable evidences of the frequent action of running water.' *Gould*,

Waters, § 264. The definition cited from *Howard v. Ingersoll*, 13 How. 415 (14 L. Ed. 189), is taken from the leading opinion by Wayne, J.; but Judge Curtis gives a somewhat different definition, in which the character of the bed of the river is taken as the distinctive element of the definition, and the bed is defined as 'that soil so usually covered by water as to be distinguishable from the banks by the character of the soil or vegetation, or both, produced by the common presence and action of flowing water.' 'In all cases,' he continues, 'the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearance they present; the banks being fast land, on which vegetation, appropriate to such land in the particular locality grows,' etc. But the case comes equally within this definition. Both definitions agree in holding that the bed of the river is bounded by the permanent or fast banks by which its waters are confined, and in this case there is but one set of banks that can be thus characterized."

Sec. 669. Riparian rights of mill owners—Interference with by floating logs. One who, while floating timber down a stream during a flood, suffers it to accumulate in large masses against some boom posts near a mill owner's premises, which broke part of his dam and diverted water from the course of the stream, whereby the mill owner's land was washed, his fence demolished, and drift wood piled and scattered in his field, is liable for such injuries. *Gulf Red. Cedar Co. v. Walker*, 132 Ala. 553 (31 So. Rep. 373). W. Va. Code, p. 1071, § 28, relating to booms, created no new right in mill owners, but only placed the existing constitutional and common-law rights of such riparian owners beyond judicial construction to the contrary. The erection of a boom in such close proximity to a mill, without consent of the owner thereof, as to impede the flow of the water, and thereby cause a deposit of sand and other sediment immediately below the dam of such mill, whether a natural fall or an artificial structure, in such manner as to destroy in an appreciable degree the water power of such fall or dam, creates an unlawful nuisance, and renders the owner of such boom liable to the mill owner for the damages occasioned by the creation and continuance of such nuisance. The measure of damages is the loss sustained by such mill owner during the continuance of such nuisance, and is to be ascer-

tained by the rental or profit-earning value of such property, as though such nuisance did not exist. *Pickens v. Coal River Boom & Timber Co.*, 51 W. Va. 445 (41 S. E. Rep. 400; 90 Am. St. Rep. 819). The court say: "In the case of *Buchanan v. Railroad Co.*, 48 Mich. 364 (12 N. W. Rep. 490), it was held, 'The right to obtain water power from a stream for milling purposes, and the right to use the stream for floatage of logs, modify each other; and, though the exercise of each may render the other less valuable, there is no ground for complaint if it is considerate and reasonable.' A navigable stream may be used for both milling and log purposes, in a reasonable manner, notwithstanding such uses may mutually interfere with and injure each other. 4 Am. & Eng. Enc. Law (2d Ed.) 710-712. Such rule applies even to streams only floatable in damp weather. *Gaston v. Mace*, 33 W. Va. 14 (10 S. E. Rep. 60; 5 L. R. A. 392; 25 Am. St. Rep. 848). A reasonable manner means in such manner as will not destroy or impair the common-law or constitutional rights of a prior mill operator. It does not mean an illegal manner. In determining where to locate and how to construct its boom, it was the duty of the defendant to so construct and locate it as not to injure plaintiff's dam rights to water power, whether natural or artificial. If it did so, its action was wrongful and illegal, and the construction of its boom unskillful and negligent, in so far as those rights were concerned. It had no right to locate its boom in such proximity to plaintiff's waterfall or dam, or so construct it, as to render the same materially less beneficial to plaintiff. Nor had it the lawful right to locate and construct its boom any place below plaintiff's water power where such an effect would be produced, except by paying him the damage occasioned thereby. *Tinsman v. Railroad Co.*, 26 N. J. L. 148 (69 Am. Dec. 565); *Richards v. Peter*, 70 Mich. 286 (38 N. W. Rep. 278); *Tillotson v. Smith*, 32 N. H. 94 (64 Am. Dec. 355); *Lee v. Iron Co.*, 57 Me. 481 (2 Am. Rep. 59); *Brown v. Bush*, 45 Pa. 61; *Crittenden v. Wilson*, 5 Cow. 165 (15 Am. Dec. 462); *Eddy v. Simpson*, 3 Cal. 247 (58 Am. Dec. 408); *Pearson v. Rolfe*, 76 Me. 380; *Dwinel v. Veasie*, 44 Me. 167 (69 Am. Dec. 94); *Pillsbury v. Moore*, 44 Me. 154 (69 Am. Dec. 91); *Alexander v. City of Milwaukee*, 16 Wis. 255; *Miller v. Pulp Co.*, 38 W. Va. 558 (18 S. E. Rep. 740)."

Sec. 670. Riparian rights of municipal corporations.
An incorporated municipality situated on a natural flowing

stream is, in its corporate capacity, a riparian proprietor, having the rights and subject to the liabilities of such proprietor. Such a municipality may supply water to its inhabitants for domestic use, returning to the stream the water not consumed; and a lower proprietor who uses the water of the same stream for power has no legal cause for complaint against such upper proprietor for so using the water of the stream; but it has no right to materially diminish the flow of water in such stream, to the injury of a lower proprietor, by supplying water from the stream to persons outside of such municipality, or to be transported away from such city, or by supplying to manufactories for power purposes more than a reasonable share of the water, considering all the circumstances. *City of Canton v. Shock*, 66 O. St. 19 (63 N. E. Rep. 600; 58 L. R. A. 637; 90 Am. St. Rep. 557). The court say: "It is urged by counsel for defendants in error that a municipality situated on a natural water course is not, in its corporate capacity a riparian proprietor, and that only those inhabitants whose lots or lands border on the stream are such proprietors; and some cases are cited which seem to take that view of the law. Other cases are decided upon the theory that such municipality is itself, in its corporate capacity, a riparian proprietor, and entitled, as such, to riparian rights in the stream upon which it is situated. *Water Co. v. Carnes*, 65 Vt. 626 (27 Atl. Rep. 609; 21 L. R. A. 769; 36 Am. St. Rep. 891); *Mayor, etc., of City of Philadelphia v. Spring Garden Com'rs*, 7 Pa. 348; *City of Philadelphia v. Collins*, 68 Pa. 106; *Jones*, Easm. § 747, and cases cited in a note to the section. In this state the question remains undecided by this court, and therefore is an open one, and we are at liberty to follow such rule of decision as is supported by sound reason and the weight of authority. It was held by this court at this term in *City of Mansfield v. Balliett*, 65 O. St. 451 (63 N. E. Rep. 86; 58 L. R. A. 628), that a city situate on a stream is liable in its corporate capacity to a lower proprietor for polluting the water of such stream by running the sewage of such city and its inhabitants into such stream. This case holds the city, in its corporate capacity, and as an upper proprietor, liable to a lower proprietor for polluting the water of the stream; and if the city is liable not only for its own acts, but also for the acts of its inhabitants, in flowing sewage into the stream, it must be upon the principle that, as upper riparian proprietor, it has violated its duty toward a lower riparian proprietor on the same stream, and that therefore the city, in its corporate

capacity, is a riparian proprietor on the stream, and must bear the burdens of such position. While the inhabitants own their lots individually, the city owns the streets, the fire department, and all other public property and public works, and, in its corporate capacity, provides for the convenience and welfare of its inhabitants as to streets, fire protection, lighting, and supplying water; and in such and other like matters the city overshadows the individuals, and stands in its corporate capacity as a single proprietor extending throughout its entire limits, and entitled as such, to all the rights, and subject to all the liabilities, of a riparian proprietor on the stream upon which it is situated. Sound reason, the weight of authority, and the present advanced state of municipal government, rights, and liabilities, require that a municipality should be held and regarded, in its entirety, as an individual entity, having in its corporate capacity the rights, and subject to the liabilities, of a riparian proprietor; and we so hold in this case.

The bringing of the action against the city for damages is of itself an implied admission that the city, in its corporate capacity, is an upper proprietor, liable for the wrongful diversion or use of the water of the stream upon which it is situated. Being charged with the liability of such proprietor, as conceded by bringing the action, and as was rightly held in the *City of Mansfield Case*, it must also be accorded the rights and benefits of such proprietor. As such proprietor, the city uses the water of the stream, through its waterworks, in extinguishing fires, sprinkling streets, and other public purposes, and supplies water to its inhabitants for domestic use and manufacturing purposes. Being an upper riparian proprietor, it follows, as a matter of law, that it has the right to use out of the stream all the water it needs for its own purposes, returning to the stream all that is not consumed in such use; not, however, transporting the water, as was done in *Railroad Co. v. Miller*, 112 Pa. 34 (3 Atl. Rep. 780), nor diverting the water, as was done in *Wheatley v. Chrisman*, 24 Pa. 298 (64 Am. Dec. 657). * * *

It is also averred in the amended petition that the city supplies water to people outside of the city for domestic, commercial and manufacturing purposes. If such supply to outsiders, or to be transported away from the city for commercial purposes, is sufficient in quantity to materially injure defendants in error, taking into consideration the size of the stream and water supply, the city, to that extent, is exceeding its right as a riparian proprietor. The general rule is well stated by Paxson,

J., in *Railroad Co. v. Miller*, 112 Pa. 34, 41 (3 Atl. Rep. 780, 781), as follows: 'The principle established by a long line of decisions is that the upper riparian owner has the right to the use of the stream on his land for any legal purpose, provided he returns it to its channel uncorrupted and without any essential diminution; that in all such cases the size and capacity of the stream is to be considered, and that any interruption of or interference with the rights of the lower riparian owner is an injury for which an action will lie, unless too trifling for the law to notice.' The obligation to return the water to the stream without 'any essential diminution' means that the water not consumed in the use or 'legal purpose' must be returned to the stream, or an opportunity given for it to flow back into the stream by the ordinary channels. It cannot be lawfully diverted or transported, so as to prevent it from flowing back into the stream.

The city having no right to materially diminish the flow of the water in the stream to the injury of defendants in error by supplying water to outsiders, or for commercial purposes to be transported to other parts, or to supply to its inhabitants for power purposes an unreasonable quantity, as above pointed out, it follows that if the city has materially diminished the flow of the water in the stream by so supplying water to outsiders or for transportation, or unreasonably for purposes of power, it is liable to respond in damages to the party injured thereby; but for the water consumed by the city for its own purposes, or so supplied to its inhabitants for domestic use, even though it received pay therefor, it is not liable. The water taken by the city from the stream for its own use, and so supplied to its inhabitants, is taken by virtue of its rights as a riparian proprietor, and not by virtue of the right of eminent domain, and therefore no compensation need be made therefor."

Sec. 671. Navigable waters—Title to and control of by state. The state holding the fee in the shores of tide water subject to the public right of navigation and the right of congress to regulate commerce, may convey the same to a city subject to these rights. *Mobile Transp. Co. v. City of Mobile*, 128 Ala. 335 (30 So. Rep. 645; 86 Am. St. Rep. 143). Under the commerce clause of the United States Constitution (Art. 1, § 8, par. 3), congress has the power, in the interest of commerce, to authorize the obstruction, and even closing, of the navigation of a tide water channel. *Frost v. Washington Co. R. Co.*, 96

Me. 76 (51 Atl. Rep. 806; 59 L. R. A. 68). In New Hampshire it is held that the legislature may authorize a private corporation to dam the outlet to a navigable lake so as to raise or lower its water level, though the public rights of navigation and fishery thereby are injured. *State v. Sunapee Dam Co.*, 70 N. H. 458 (50 Atl. Rep. 108; 59 L. R. A. 55). Md. Code Pub. Gen. Laws, art. 23, § 92, providing that "no bridge shall be erected on a navigable river unless authorized by an act of the general assembly," applies to railroad companies, and the incorporation of such a company does not of itself give it the right to cross navigable waters of the state without permission from the legislature. *Dundalk, S. P. & N. P. Ry. Co. v. Smith*, 97 Md. 177 (54 Atl. Rep. 628). For exhaustive collation of authorities on "Right to obstruct or destroy rights of navigation," see 59 L. R. A. 33-94.

Sec. 672. Navigable waters—Title and rights of riparian owners. A patent by the United States to land along a stream where the tide ebbs and flows conveys to the high-tide line along the shore. *Mobile Transp. Co. v. City of Mobile*, 128 Ala. 335 (30 So. Rep. 645; 86 Am. St. Rep. 143). A lake, although of sufficient size and depth to be navigable in the common acceptance of that term, is not navigable in the strict legal sense so as to vest the title to the bed thereof in the state, where it is covered and filled with trees, stumps, logs, and snags, through which there are no proper channels to make navigation available. Ordinarily a grant of lands bounded by such body of water would extend to the center thereof, but the rule is otherwise where the deed expressly calls for low water mark; but the grantee may enjoin a draining of the lake by other riparian owners. *Webster v. Harris*, Tenn. (69 S. W. Rep. 782; 59 L. R. A. 324). See opinion for exhaustive discussion of the rules for determining the navigability of a stream, and the rights of riparian owners. At common law, in the absence of any special title by grant or prescription, the boundary of landowners abutting on the sea, or upon an estuary, tidal stream, or arm of the sea where there was a regular rise and fall of the tides, extended only to high-water mark. The soil between high-water mark and low-water mark was the property of the crown. This rule has not been changed by Ga. Civ. Code §§ 3059, 3060. *Johnson v. State*, 114 Ga. 790 (40 S. E. Rep. 807). In Missouri the title of a riparian owner on a fresh water navigable stream extends to low water mark, sub-

ject to public rights as regards navigation, and his erection, between high and low water mark, of a permanent building is not of itself unlawful; but the title to the bed of such stream below low water mark is in the state in trust for the people, and the grant to a city, by its charter, of the power to control a portion of such river for the purpose of constructing and regulating public wharves, etc., does not give it the right to grant a permit for the erection of a private building extending beyond the low water mark. *State v. Longfellow*, 169 Mo. 109 (69 S. W. Rep. 374). An owner of land lying at high water mark, but who does not own the state's title to lands lying below the high water mark, cannot, in his grant of an easement of a right of way across lands above high water mark, and in aid of the enjoyment of such easement, impose a restriction against the erection of buildings on lands lying below high water mark. *Atlantic City v. New Auditorium Pier Co.*, 63 N. J. Eq. 644 (53 Atl. Rep. 99). As to effect of such restriction where a grantor had acquired the state's title to land below high water mark, see *Evans v. New Auditorium Pier Co.*, 63 N. J. Eq. 674 (53 Atl. Rep. 111).

Sec. 673. Navigable waters—Title of state of Wisconsin to bed of navigable lake—Constitutionality of statute prohibiting the cutting of ice thereon except on certain conditions. The title to the beds of navigable lakes in the state of Wisconsin is vested in the state in trust to preserve the same for the enjoyment of the people. The state has no proprietary right in such beds or in the water above the same, nor in the fish that inhabits such water or the fowls that resort thereto, or the ice that forms thereon, which it can deal in by sale or otherwise. Therefore, it is held that Wis. Laws 1901, ch. 470, prohibiting the cutting of ice from any meandered lake of the state, for shipment out of the state, except by persons licensed in the manner prescribed by the statute, which requires the payment of certain fees, the giving of bond and payment to the state of a certain sum for every ton of ice removed, is held unconstitutional. *Rossmiller v. State*, 114 Wis. 169 (89 N.W. Rep. 839; 58 L. R. A. 93; 91 Am. St. Rep. 910). The court say: "Is ice, formed naturally upon the public waters of the state, state property in a proprietary sense,—property which can be dealt with as a private person deals with his property rights? It must be assumed without discussion that no property right was acquired by the state by the mere

legislative declaration that ice formed upon meandered lakes within the boundaries of the state belongs to the state as property. The legislature has no such arbitrary power, under our constitutional system, as that of changing the nature of the ownership of property by its mere fiat. It can no more accomplish that result in that way than it can change the laws of nature by a legislative declaration. Ice formed on public water is the absolute property of the state independent of any legislative assertion in that regard, or not at all. We would not for a moment indulge in the idea that any branch of the lawmaking power, responsible for placing upon the statute books the enactment in question, thought otherwise. The declaration as to state ownership was a mere proclamation that henceforth the state proposed to sell its ice, or give it away, according as the same was desired for domestic consumption or shipment outside the state, it being supposed, as indicated by the executive approval of the enactment, that the fact of state ownership was not open to question. Of course, if in that there was a misconception of the law, the law remains unchanged notwithstanding. 'An enactment of the legislature based on an evident misconception of what the law is will not have the effect, per se, of changing the law so as to make it accord with the misconception.' *Byrd v. State*, 57 Miss. 243, 247 (34 Am. Rep. 440).

What is the real nature of the state's interest in ice formed upon its public waters, if it were not for the attitude of the lawmaking power as indicated, we must confess, in the light of the repeated decisions of this and other courts, would not seem to be open to serious question. As matters stand, we feel constrained to say, it appears that the indications, from the origin of the state's interest in public waters and the purposes to be served thereby, and the judicial declarations in regard thereto in this and other courts, are on one side of the controversy, and the legislation is upon the other. Unless that appearance can be changed, since the proposition involved is purely of a judicial character, there can be no question as to which view must prevail. It has been universally supposed, we venture to say, that the right of every person within the state to enjoy its public waters for every legitimate purpose, including the cutting and appropriation of ice, which does not wrongfully interfere with the right of any other person to like enjoyment, subject only to such mere police regulations as the legislature may in its wisdom prescribe to preserve the common heritage

of all, is a constitutional right of all persons within the state. While the language used in speaking of the subject is sometimes restrictive, looking at the same only in the literal sense thereof, in that it points only to the people of the state, obviously the rule includes all people lawfully within the state, whether of the state, in the sense of being residents thereof, or otherwise. It has not been supposed that the state could deal with public waters, or with any other thing held upon a like trust to that of such waters, as the proprietor thereof,—that any such thing could be treated in any respect as the absolute property of the state, and used for purposes of revenue. Obviously, there can be no difference between public water, in a liquid condition, and in the form of ice, or between water and the land covered thereby, or the fish or fowls which inhabit the same, or any of the animals *ferae naturae*, in respect to sovereign authority over the same. If one may be dealt with as the absolute property of the state, the others may be. It follows that, if the legislation in question be valid, the right to take water from navigable lakes for shipment, though it in no way affect the character thereof for other public purposes, and the right to fish and hunt, may be subjects of sale by the state for the mere purpose of adding to the public revenues; those things which have been supposed to be public and for the individual enjoyment of all without restraint, other than by reasonable police regulations to preserve their character in that regard, things above sovereign authority to barter in as in ancient systems entirely foreign to ours, will cease to have that character in fact, and our notions in regard thereto will have to be readjusted to the newly established condition,—that which regards the state, not as a mere trustee for the whole people, of the subjects we have mentioned, but as the absolute owner thereof, with power to deal therewith as a private person might if he were such owner.

After the most painstaking investigation which we can give to the act under consideration to the end that it may be sustained, if possible, we confess our inability to discover anything in reason or authority to support the idea of state ownership of ice formed on public waters. The learned attorney general, after exhausting, we must assume, the resources of his office to that end, has not been able to aid us. His printed brief and oral argument as well, are implied confessions thereof, and without any reflection, we will say in passing, upon either his industry or ability in the discharge of official duty. The attorney general makes suggestions in regard to how the law might be

held valid, by assuming that its purpose is other than merely to traffic in ice; but as we view the law we are not warranted in departing from that purpose. We will say, however, that if we could see any legislative intent to exercise police power to prevent injury to common rights by depleting navigable waters, as the court found in *Sanborn v. Ice Co.*, 82 Minn. 43 (84 N. W. Rep. 641; 51 L. R. A. 829; 83 Am. St. Rep. 401), cited to our attention with confidence by counsel for the state, we should hesitate before announcing that the taking of ice from a large body of navigable water could be reasonably legislated against as interfering with common rights by reducing the level of the lake. It was held in that case, in accordance with elementary principles, that the taking of ice from public waters, by any one who can lawfully gain access thereto, is a constitutional privilege,—one common to all persons; and, impliedly, that legislative power in regard thereto extends only to such reasonable regulations as will prevent the enjoyment by one person from invading the common right of enjoyment. There is no suggestion in the opinion of the court that ice formed on public waters is a subject of state ownership—property which it can sell to replenish its treasury. The action was grounded on the right of a riparian proprietor to prevent injury to his riparian rights by the lowering of the level of the water. Two members of the court, in a vigorous dissenting opinion which indicates much study of the subject, gave as their view of the law that the right to take ice from public waters for the consumption of the takers, or for sale as an article of commerce, is common to all, and is so superior to riparian rights that the latter cannot interfere with the enjoyment of the former on the ground that it reduces the level of the water.

This reason is advanced in *Sanborn v. Ice Co.*, 82 Minn. 43 (84 N. W. Rep. 641; 51 L. R. A. 829; 83 Am. St. Rep. 401), for the conclusion there reached, which we are urged by counsel for defendant in error to adopt: While ice formed on public waters is common property, it is not such property for purely commercial purposes; no one has an absolute right to appropriate therefrom more than he needs for his domestic use. If that were so, it would not follow that the surplus ice belongs to the state and may be appropriated for revenue purposes. But the doctrine itself seems to be out of harmony with all well recognized principles of public waters. As suggested in the dissenting opinion, if the privilege to take ice only entitles each

person to sufficient of the common stock for his domestic needs, then the common privileges of fishing and hunting must be likewise limited. We are not aware of any such limitation. The right to take game for sale, or take water or ice from the public stock for that purpose, has never been questioned under our system, so far as we are aware. To establish the contrary would be a most serious impairment of common rights in navigable waters. Those rights cannot be too carefully guarded. That they extend to the taking of ice for sale, as well as for the domestic use of the appropriator, has been repeatedly held where public rights in such waters are no more extensive or clearly defined and maintained than in this state. In *Ice Co. v. Davenport*, 149 Mass. 322 (21 N. E. Rep. 385; 14 Am. St. Rep. 425), the court said: 'It is too well settled to be disputed that the property in the great ponds is in the commonwealth, that the public have the right to use them for fishing, fowling, boating, skating, cutting ice for use or sale, and other lawful purposes.' The supreme court of Iowa, in *Brown v. Cunningham*, 82 Ia. 512, 516 (48 N. W. Rep. 1042; 12 L. R. A. 583), used this vigorous language in condemning the idea of government ownership, strictly, so called, in public water: 'The government has no more property in the water than a riparian owner or the public. The beneficent Creator opened the fountains which filled the stream for the benefit of his creatures, and has bestowed no power upon man or governments created by man to defeat his beneficence. Of course the use of the water may be regulated by the state, but the state may not forbid its use to the people.' In the state of Maine it is held that the limit of state authority to interfere with the taking of ice from public waters is the making of regulations which will preserve the common right to do so. *Barrows v. McDermott*, 73 Me. 441; *Woodman v. Pitman*, 79 Me. 456 (10 Atl. Rep. 321; 1 Am. St. Rep. 342). In *Brastow v. Ice Co.*, 77 Me. 100, it was held that the right to take ice from a navigable lake is the common right of all and is governed by the same rule as the public right to boat and fish. In *Woodman v. Pitman*, 79 Me. 456 (10 Atl. Rep. 321; 1 Am. St. Rep. 342), it was held that the right to take ice from navigable waters is as absolute as the right to walk upon the ice. In *Rowell v. Doyle*, 131 Mass. 474, the court said: 'The right of fishing, as well as the right of taking ice in a great pond, is a public right, which every inhabitant who can obtain access to the pond without trespass may exercise, so long as he does not interfere with the reasonable exercise

by others of these and like rights in the pond, and complies with any rules established by the legislature or under its authority.' It must be understood, in considering the above, that the reference to legislative regulations refers merely to such as the law-making power may adopt for the purpose of preserving the common rights, not to such as may be enacted to abridge or destroy those rights by treating the ice as state property instead of, if property at all in its natural state, that of the whole people. In *Wood v. Fowler*, 26 Kan. 682 (40 Am. Rep. 330), the court said, in effect, that the right to take ice, as the right to take fish in public waters, is in the whole people, and that the first taker becomes, by his act of actual appropriation, the owner. The same was held in *Manufacturing Co. v. Robertson*, 66 N. H. 1 (25 Atl. Rep. 718; 18 L. R. A. 679), and is laid down by text writers as elementary. Gould, *Waters*, § 191."

Sec. 674. Accretion—Rights of riparian owners. The law of accretion applies to the Missouri river, notwithstanding that, owing to the swiftness of its current and the softness of its banks, the changes are more rapid and extensive than in most other rivers. Where the official plat of the survey of government lands shows a river as one boundary of a certain lot, a subsequent patent for the lot, describing it by number, and referring to the plat, on which it is marked as containing a certain amount, and deeds describing the lot by number, pass all accretions to the lot up to their respective dates. *De Long v. Olsen*, 63 Neb. 327 (88 N. W. Rep. 512). Where, after the granting by the government of the south half of a section of land, a strip intervening between it and a river, which constituted the fractional north half of the section, is washed away so that the south half of the section becomes riparian lands, subsequent accretions to it formed by the river belong to the owner of the south half section as against a subsequent patentee of the government of the north fractional half as described by the original survey. *Widdecombe v. Chiles*, 173 Mo. 195 (73 S. W. Rep. 444; 61 L. R. A. 309; 96 Am. St. Rep. 507). See opinion for review of cases on this subject.

Sec. 675. Islands formed in streams. If an island springs up in the midst of a stream, whether it be on one side or the other of the thread of the river, when formed, it is an accretion to the soil in the bed of the river. *East Omaha Land Co. v. Hansen*, 117 Ia. 96 (90 N. W. Rep. 705). Applying Cal.

Civ. Code, § 1016, providing that "islands and accumulations of land, formed in the beds of streams which are navigable, belong to the state, if there is no title or prescription to the contrary," it is held that the title to an island and its accretions formed in a navigable stream is in the state, although by reason of its accretions it joined the mainland. *Glassell v. Hansen*, 135 Cal. 547 (67 Pac. Rep. 964).

Sec. 676. Obstruction or diversion of waters. A lower riparian owner is entitled to receive the accustomed flow of water through his property, and an upper owner interfering with this right cannot claim immunity from damages by reason of the fact that he brings other water from a new source as a substitute for that diverted. *Commissioners of Aberdeen v. Bradford*, 94 Md. 670 (51 Atl. Rep. 614). The owner of land on the bank of a stream may be enjoined from the erection on his own lands of an embankment which increases the overflow in times of flood upon the land of the opposite proprietor to the injury thereof. *Sullivan v. Dooley*, 31 Tex. Civ. App. 589 (73 S. W. Rep. 82). Citing, *O'Connell v. Railway*, 87 Ga. 246 (13 S. E. Rep. 489; 13 L. R. A. 394; 27 Am. St. Rep. 246); *Railway v. Brevoort*, (C.C.) 62 Fed. Rep. 129 (25 L. Ed. 527); *Burwell v. Hobson*, 12 Grat. 322 (65 Am. Dec. 247). A lower owner has no right to interfere with the natural flow of the water of a stream so as to set it back onto the upper estate. *Carley v. Jennings*, 131 Mich. 385 (91 N. W. Rep. 634). Where a town diverts a stream supplied by springs from its course by the construction of an intake well or reservoir, the overflow from which, if not interfered with by daily pumping, would give the stream its natural flow before reaching the land of an adjoining owner, the injury to him arises from the pumping and is a continuous one to which the statute of limitations does not apply. *Commissioners of Aberdeen v. Bradford*, 94 Md. 670 (51 Atl. Rep. 614). A stipulation in a deed by a mill owner of lands forming the bed of a river "reserving all use of the water power, said party of the second part not to obstruct the same in any manner," does not deprive such party of the second part of the right to drive piles in the bed of the river, upon his land, upon which to set a building, where they would have no appreciable effect on the water power used by the grantor's mill, and there was no well founded apprehension of injury to him. *Knight v. Barr*, 130 Mich. 673 (90 N. W. Rep. 849). For particular fact case as to when a dam is an obstruction to a water

course, see *Coleman v. Le Franc*, 137 Cal. 214 (69 Pac. Rep. 1011).

Sec. 677. Obstruction or diversion of waters—Liability of railroads. A railway company constructing a bridge across a navigable stream so negligently as to obstruct the navigation of the stream is responsible for the damages caused by the obstruction. *Armistead v. Shreveport & R. R. Val. Ry. Co.*, 108 La. 171 (32 So. Rep. 456). To render a railroad company liable for the overflow of lands caused by its obstruction of a ditch constructed by it to carry off the water of a stream crossed by the track, in compliance with Burns' Ind. Rev. Stat., § 5153, subd. 5, there must be some allegation that the obstruction was the result of its wilfulness or negligence. *Cleveland, C. C. & St. L. Ry. Co. v. Wisheart*, 161 Ind. 208 (67 N. E. Rep. 993). A railroad company cannot be held liable for injuries to lands resulting from back water caused by the forming of an ice gorge at one of its bridges without proof that such bridge had not been constructed with proper care, having regard to the landowners above and below. See opinion for particular evidence held insufficient to support a recovery in such a case. *Berninger v. Sunbury, H. & W. Ry. Co.*, 203 Pa. St. 516 (53 Atl. Rep. 361). A railroad company is liable for damages sustained by a landowner during a flood from back water caused by an insufficient culvert, where the evidence tended to show that the flood was due to a heavy, but not unprecedented, rainfall; and it is no defense that in the construction of the culvert it acted upon the advice of competent and skillful engineers. *Houghtaling v. Chicago G. W. Ry. Co.* 117 Ia. 540 (91 N. W. Rep. 811). In discussing this subject, the supreme court of Alabama, in the case of *Southern Ry. Co. v. Plott*, 131 Ala. 312 (31 So. Rep. 33), say: "In the construction and maintenance of railroads common prudence requires the employment of at least ordinary engineering knowledge and skill, to the end of avoiding injury to property which will probably come from the obstruction of natural streams and water ways. While those engaged in such undertakings are not bound to provide against floods of which the usual course of nature affords no premonition, yet they are bound to use ordinary care to build so as not to obstruct to the damage of others rainfalls such as may reasonably be expected, whether they are likely to be frequent or of rare occurrence. *Railroad Co. v. Bridges*, 86 Ala. 453 (5 So. Rep. 864; 11 Am. St. Rep. 58); *Railway Co. v. Gil-*

leland, 56 Pa. 445 (94 Am. Dec. 98); *Railway Co. v. Pomeroy*, 67 Tex. 498 (3 S. W. Rep. 722); *Railroad Co. v. Halloren*, 53 Tex. 46 (37 Am. Rep. 744); *Brown v. Railroad Co.*, 183 Pa. 38 (38 Atl. Rep. 401, and notes). A structure which dams up the water way and causes the water to spread dangerously from its natural course may amount to a nuisance, and the maintenance, as well as the erection of a nuisance, with knowledge of its harmful character, may create a liability for resultant injuries. *Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. Co.*, 51 N. Y. 573 (10 Am. Rep. 646); *Dickson v. Chicago, R. I. & P. R. Co.*, 71 Mo. 575. Though the defendant acquired the railroad after the embankment complained of was built, its character, and that of the stream and surrounding country, together with common knowledge with which it was legally charged, concerning rainfalls to which the country was subject, may have been sufficient to show it had notice of the consequences which would naturally follow from continuing the existing conditions."

In Indiana it is held that a landowner's cause of action for obstruction of a water course by a railroad company's construction of an insufficient culvert therefor under its road bed accrues only when there is an overflow, and is not for a permanent injury; and only damages that have accrued to date can be recovered under it, and not prospective damages. *Cleveland, C. C., & St. L. Ry. Co. v. Kline*, 29 Ind. App. 390 (63 N. E. Rep. 483).

Sec. 678. Pollution of streams—Discharge of sewage—Rights and liabilities of cities. The discharge of sewage into a stream from the sewer system of an improvement company which so pollutes the water as to render it unfit for domestic use, may be enjoined by a lower riparian owner, although the granting of such relief may subject such company to loss or inconvenience. Nor does the complainant in such a case lose his right to injunction because he waits until the completion of the sewage system before bringing his action, where he did nothing to induce the defendant to construct the same. *West Arlington Imp. Co. v. Mount Hope Retreat*, 97 Md. 191 (54 Atl. Rep. 982). Where a municipal corporation, without a legal appropriation in which the riparian owner is afforded an opportunity to obtain compensation, causes its sewage to be emptied into a natural water course, thereby creating a nuisance inflicting special and substantial damages on such proprietor,

it is liable to an action for the damages so sustained. *City of Mansfield v. Balliett*, 65 O. St. 451 (63 N. E. Rep. 86; 58 L. R. A. 628), following *Rhodes v. City of Cleveland*, 10 Ohio, 160 (36 Am. Dec. 82). See principal case for exhaustive review of authorities on the nature of the property rights of a riparian owner. Persons acquiring the right to use water power from a dam as lessees of a company authorized by law to maintain the dam for the purpose of furnishing water power and to sell, let or otherwise dispose of such power, have property rights of which they cannot be deprived without compensation and they may join in an action for compensation for the impairment of such rights by the pollution of the water with city sewage. *Doremus v. Mayor, etc., of City of Paterson*, 63 N. J. Eq. 605 (52 Atl. Rep. 1107).

Sec. 679. Pollution or obstruction of streams—Remedies—Measure of damages. A lower mill owner may have a perpetual injunction against the continuous pollution by a coal company of the waters of a stream supplying the mill, where the injury threatens to be permanent; and he may recover as damages the increased cost of running his mill and cleaning out the dam and race resulting from defendant's wrongful acts, but not the cost of providing contrivances tending to prevent future injury. *Keppel v. Lehigh Coal & Nav. Co.*, 200 Pa. St. 649 (50 Atl. Rep. 302). An action to restrain the continuance of an obstruction to a water course and for damages for injury already suffered thereby cannot be enjoined. *Miner v. Nichols*, 24 R. I. 199 (52 Atl. Rep. 893). One sued for the pollution and obstruction of a water course cannot be allowed to show that the plaintiff could procure pure water from another source. *Stevenson v. Ebervale Coal Co.*, 203 Pa. St. 316 (52 Atl. Rep. 201). The measure of damages for the pollution of a stream by the deposit of coal mining waste so as to prevent the operation of a mill is the cost of removing the waste, unless the expense of such removal exceeds the value of the mill property, in which case the value of the property is the limit. *Stevenson v. Ebervale Coal Co.*, 201 Pa. St. 112 (50 Atl. Rep. 818; 88 Am. St. Rep. 805). In determining the damages recoverable for the destruction of immature crops caused by the overflow of lands, it is proper to consider the rental value of the land on which the crop destroyed was planted, the costs of the fertilizers used, the cost of labor, etc., in the preparation of the land, and the cultivation of the crop

up to the date of the injury, the fair value of the services of the owner of the crops in overlooking and attending to the preparation of the land and the cultivation of the crop, and interest on the amount lost until verdict. *Lampley v. Atlantic Coast Line R. Co.*, 63 S. C. 462 (41 S. E. Rep. 517). For case determining particular questions as to admissibility of evidence and applicability of instructions, in an action for damages to land by discharge of sewerage into a stream, see *Hollenbeck v. City of Marion*, 116 Ia. 69 (89 N. W. Rep. 210).

Sec. 680. Maintenance of canal over lands of another—Liability for damages resulting from percolation of water. A corporation claiming an easement over the lands of another for a canal in which it flows water not originating on such land, is liable for damage caused by the water percolating through the raised banks of the canal onto such owner's land; and also for damages resulting from such banks and the debris from the canal obstructing the flow of a water way draining such land. *Mullen v. Lake Drummond Canal & Water Co.*, 130 N. C. 496 (41 S. E. Rep. 1027; 61 L. R. A. 833; see pp. 833-877 for exhaustive collation of authorities on "Construction and operation of canals"). For similar holding on last point, see *Williams v. Lake Drummond Water & Canal Co.*, 130 N. C. 746 (41 S. E. Rep. 1030).

SPECIFIC PERFORMANCE.

EPITOME OF CASES.

Sec. 681. What contracts may be specifically enforced—General principles and particular cases. As a general rule if an action at law will not lie on a contract to recover damages for its breach, equity will decline to decree its specific performance or execution. *Kent v. Dean*, 128 Ala. 600 (30 So. Rep. 543). A contract which can be established only by inference from the acts and parol declarations of the parties cannot be specifically enforced. *In re Shaffer's Estate*, 205 Pa. St. 145 (54 Atl. Rep. 711). Specific performance may be had of an agreement to lease property "for a period of one or more

years," such a stipulation creating a term for two years at least. *Boston Clothing Co. v. Solberg*, 28 Wash. 262 (68 Pac. Rep. 715). Applying *N. J. Laws* 1898, p. 670, §§ 21, 39, it is held that a contract entered into by a married woman with her husband and duly acknowledged by her as a married woman, to convey land in which she has a dower interest, may be specifically enforced by a court of equity. *Goldstein v. Curtis*, 63 N. J. Eq. 454 (52 Atl. Rep. 218). A suit for specific performance cannot be maintained upon a proposition made by defendant and accepted by plaintiff whereby defendant "proposed to secure" for plaintiff a certain canal right of way; since such contract creates an agency requiring personal service, and relief for a breach thereof is confined to an action for damages. *Dukes v. Bash*, 29 Ind. App. 103 (64 N. E. Rep. 47). Specific performance cannot be had of a contract to cut timber, saw it into lumber, dry it and deliver it at certain places, where it is uncertain from the contract what timber is to be cut, and the full performance of the stipulations of the contract would unduly tax the superintendence of the court. *Bomer v. Canady*, 79 Miss. 222 (30 So. Rep. 638; 55 L. R. A. 328; 89 Am. St. Rep. 593). See opinion for exhaustive discussion of this subject.

Sec. 682. What contracts may be specifically enforced—Mutuality required. Specific performance will not be decreed where there is no mutuality of obligation. *Tryce v. Dittus*, 199 Ill. 189 (65 N. E. Rep. 220); *Hector-Johnston Co. v. Billings*, Neb. (91 N. W. Rep. 183). A written contract to sell real estate, resting upon a sufficient consideration, signed by the owner and accepted by the purchaser, is not invalid for want of mutuality. *Burke v. Mead*, 159 Ind. 252 (64 N. E. Rep. 880). The right of a wife who has once lived apart from her husband, on account of his misconduct giving her grounds for a divorce, to have specific performance of a subsequent agreement by him to convey land in trust for their children, in consideration of her abandoning divorce proceedings and resuming marital relations with him, cannot be denied after her resumption of the marital relations, on the ground of want of mutuality of remedy; and the fact that she cannot be compelled to maintain such relations during life is immaterial. *Moayon v. Moayon*, Ky. (72 S. W. Rep. 33; 60 L. R. A. 415; 24 Ky. Law Rep. 1641).

Sec. 683. Contracts to convey land. Specific performance may be had against the vendee as well as the vendor, and where the performance required is the payment of the purchase price, it may be enforced against the vendee by the collection of the money from any of his property, or by order of sale as on execution. *Anderson v. Wallace Lumber Mfg. Co.*, 30 Wash. 147 (70 Pac. Rep. 247). A vendor to whom part of the purchase price has been paid may have a decree for specific performance, when to deny him this remedy would leave him only an action for breach of contract in which the measure of damages would be uncertain. *Maryland Clay Co. v. Simpers*, 96 Md. 1 (53 Atl. Rep. 424). Specific performance of a contract for the sale of a furnished house may be decreed, upon the vendor's refusal to perform, where part of the purchase price has been paid, although personal property is included in the sale. *Fowler v. Sands*, 73 Vt. 236 (50 Atl. Rep. 1067). Specific performance will lie against a vendor contracting to sell land not owned by him, upon his afterward acquiring title to it. *Coleridge Creamery Co. v. Jenkins*, Neb. (92 N. W. Rep. 123). A vendor may have specific performance notwithstanding a defect in his title to a part of the premises, by making compensation for such defect, where the vendee by his conduct has waived his right to abandon the contract. *Melick v. Cross*, 62 N. J. Eq. 545 (51 Atl. Rep. 16). Specific performance of a contract to purchase land will not be denied on account of its not being bona fide or the consideration excessive, where there is no evidence of fraud and the price stated was distinctly agreed upon. *Maryland Clay Co. v. Simpers*, 96 Md. 1 (53 Atl. Rep. 424).

Specific performance of a contract negotiated through one acting as agent for both buyer and seller will not be decreed unless it has been entered into with perfect fairness and without misapprehension or misrepresentation. *Andrew v. Whitwer*, (Neb.) 90 N. W. Rep. 924. Specific performance will not be decreed where the vendor's right to sell depends upon the existence of a power of sale given by implication in a will under which she claims, which is doubtful and the right to question which cannot be determined as against her children until after her death. *Boylen v. Townley*, 62 N. J. Eq. 591 (51 Atl. Rep. 116). Where an agreement to sell real estate is entered into by vendors, as owners of a part interest therein, tentatively, or on condition that the owner of the remaining interest in the property will also convey his interest for the price agreed upon,

which is not done through no fault or neglect of those entering into such agreement, it is not an abuse of discretion for the trial court to refuse to decree specific performance of the agreement as to the undivided interest in the real estate involved, held by the parties making such agreement. *Hector-Johnston Co. v. Billings*, Neb. (91 N. W. Rep. 183). Specific performance of a contract for the sale of an undivided interest in a tract of land at a certain price per acre, and which stipulated that the purchase price should be paid when the acreage of the tract had been determined by a survey to be made by the vendee at his expense, will not be enforced, where it is shown that the vendee cannot have the survey made without endangering his life. *Williamson v. Dils*, Ky. (72 S. W. Rep. 292; 24 Ky. Law Rep. 1792). For particular fact cases on specific performance of contracts to convey land, see *Parsons v. Vining*, 85 Minn. 37 (88 N. W. Rep. 1); *Cone v. Cone*, 118 Ia. 458 (92 N. W. Rep. 665); *Ross v. Page*, 11 N. Dak. 458 (92 N. W. Rep. 822); *Menger v. Schultz*, 28 Wash. 329 (68 Pac. Rep. 875); *Knight v. Knight*, 51 W. Va. 518 (41 S. E. Rep. 905).

Sec. 684. Contracts to convey land—Definiteness required. To authorize the specific performance of a contract to convey land, its provisions shall be clear and specific in all of their essential elements; but terms which the law implies need not be expressed. *Burk v. Mead*, 159 Ind. 252 (64 N. E. Rep. 880). A court may refuse specific performance of a contract for the exchange of land where it is indefinite and uncertain as to the agreement of one of the parties in regard to the assumption of incumbrances. *Tryce v. Dittus*, 199 Ill. 189 (65 N. E. Rep. 220). To authorize specific performance of a parol contract for the sale of land, the subject-matter of the contract must be clearly identified. *Higginbotham v. Cooper*, 116 Ga. 741 (42 S. E. Rep. 1000); *Dwight v. Jones*, 115 Ga. 744 (42 S. E. Rep. 48). The land must be described with such accuracy and clearness that it can be identified and its boundaries determined beyond the possibility of any further controversy. *Knight v. Alexander*, 42 Or. 521 (71 Pac. Rep. 657). See opinion for particular description held insufficient. Specific performance of a contract of sale will be denied where the description of the land is too indefinite and uncertain to warrant it and there is no reformation of the contract sought. *Glos v. Wilson*, 198 Ill. 44 (64 N. E. Rep. 734). See opinion for particular description held too indefinite. Specific performance

of a contract to convey land will not be decreed, where, by its terms, the location of the land is left for the future action of the parties. *Agnew v. Southern Ave. Land Co.*, 204 Pa. St. 192 (53 Atl. Rep. 752).

Sec. 685. Performance, diligence and good faith required of person seeking. A court will not compel specific performance of a contract unless plaintiff shows a full performance on his part, or an offer of such performance, and a readiness and willingness to perform, prior to the commencement of the action. *Kulberg v. Georgia*, 10 N. Dak. 461 (88 N. W. Rep. 87). A party to a contract for the exchange of lands who has failed to comply with his agreement to furnish a complete abstract of title showing a good title in him on a certain date, on account of his abstract showing a cloud upon the title and an outstanding incumbrance in addition to the incumbrances agreed to be assumed by the other party, cannot compel specific performance by showing that he has subsequently perfected his title. *Tryce v. Dittus*, 199 Ill. 189 (65 N. E. Rep. 220). Specific performance will not be awarded a vendee after there has been a voluntary and unconditional abandonment of the contract, and a surrender of possession of the premises, and an acceptance of the same by the vendor, followed by a subsequent transfer of title, and the establishment of new relations as to the property which are inconsistent with the performance of the contract, especially where it is apparent that his desire for specific performance has been stimulated by a subsequent increase in the value of the property. *Mahon v. Leech*, 11 N. Dak. 181 (90 N. W. Rep. 807).

Sec. 686. Demand and tender. A demand for a deed from one purchasing from the vendor after suit brought to compel him to convey need not be alleged in an amended complaint making such purchaser a party. *Kirkman v. Moore*, 30 Ind. App. 549 (65 N. E. Rep. 1042). Specific performance of a contract for the sale of land entered into by two tenants in common, as to one of whom it is a nullity, will not be decreed against the other on a tender made to the one not bound by the contract. *Ledwith v. Reichard*, 203 Pa. St. 277 (52 Atl. Rep. 251). A vendee seeking specific performance of his contract to purchase land, who has, during the life of such contract, tendered the balance due the defendants, which was wrongfully refused, and who has ever since been willing to pay

the same upon receiving a deed for the land, should not be required to pay the balance of the purchase price into court before the defendants give notice that they are willing to accept the money and deliver the deed for the land, or, in case such notice is not given, before the judgment determining the rights of the respective parties under the contract becomes irreversible by affirmance on appeal, or by the expiration of the time limited for appealing. *Lamprey v. St. Paul & C. Ry. Co.*, 86 Minn. 509 (91 N. W. Rep. 29).

Sec. 687. Practice in actions for specific performance.

Equity has no jurisdiction to enforce specific performance of a contract to convey land after the death of the vendor where, under the facts presented, a statute (Me. Rev. Stat., ch. 71 § 17) empowers the probate court to authorize his executors to execute deeds to carry out the contract, and it appears that a petition in the probate court for such an order had been denied and no appeal taken from its decision. *May v. Boyd*, 97 Me. 398 (54 Atl. Rep. 938; 94 Am. St. Rep. 937). An action for the specific performance of a contract to convey land, there being no statute to the contrary, may be brought in a court having jurisdiction of the property, or in one having jurisdiction of the person only, at the option of the plaintiff. *Epperley v. Ferguson*, 118 Ia. 47 (91 N. W. Rep. 816). Citing, *Dehart v. Dehart*, 15 Ind. 167; *Rourke v. McLaughlin*, 38 Cal. 196; *Loaiza v. Superior Court*, 85 Cal. 11 (24 Pac. Rep. 707; 9 L. R. A. 376; 20 Am. St. Rep. 197); *Burrall v. Eames*, 5 Wis. 260; *Mussina v. Belden*, 6 Abb. Prac. 174; *Lindley v. O'Reilly*, 50 N. J. L. 636 (15 Atl. Rep. 379; 1 L. R. A. 79, note; 7 Am. St. Rep. 802). A complainant seeking in the same bill both reformation and specific performance of a contract, who is denied the reformation, may be granted specific performance under the prayer for general relief. *Gough v. Williamson*, 62 N. J. Eq. 526 (50 Atl. Rep. 323). A complaint to enforce specific performance of an oral contract to convey land on the ground of part performance must distinctly and clearly aver the acts relied upon to constitute such part performance. *Horner v. McConnell*, 158 Ind. 280 (63 N. E. Rep. 472). One who has disposed of the legal title to all his interest in the property, and against whom no relief is demanded, is not a proper party to a bill for specific performance. *Grafton Dolomite Stone Co. v. St. Louis, C. & St. P. Ry. Co.*, 199 Ill. 458 (65 N. E. Rep. 424). Although specific performance be refused by the court,

it will not usually turn the purchaser, who has paid the purchase price in whole or in part, round to his remedy or remedies at law to recover damages for the breach of contract, but, having properly acquired jurisdiction of the case, will proceed to do final and complete justice between the parties, by ordering the necessary accounts to ascertain the purchase money paid, the rents with which the purchaser may be chargeable, together with damages for waste for which he may be accountable, the value of permanent improvements for which he should be allowed compensation, the taxes paid by him, if any; and, having ascertained the balance due, the court will make a decree that the same shall be paid, and, in favor of the purchaser, will ordinarily charge it upon the land. *McAllister v. Harman*. Va. (42 S. E. Rep. 920).

Sec. 688. Practice in actions for specific performance
—**Contract of married man not signed by his wife.** Construing and applying Ia. Code 1897, §§ 2974, 2979, it is held that a contract signed by the husband alone to convey lands embracing an unplatted homestead is invalid as to the homestead, but the vendee may have specific performance as to the remainder of the land after the selection of the homestead, which may be made by the court upon the owner's failure to do so, the value of the homestead being deducted from the contract price, and also the wife's contingent dower right, should she refuse to convey the same. *Townsend v. Blanchard*, 117 Ia. 36 (90 N. W. Rep. 519). In a decree against a vendor to convey, rendered in an action to which his wife was not a party, brought to compel specific performance of a contract for the sale of real estate signed only by him, the court may order that he execute a warranty deed signed by himself and wife or make restitution to the plaintiff in a certain sum. *Maris v. Masters*, 31 Ind. App. 235 (67 N. E. Rep. 699). Where, in an action brought in a court of equity to enforce the specific performance of a contract for the sale of land by the purchaser against a married man, the owner of the fee, who alone signed the contract, it appears by the contract itself that some one other than the husband was expected to sign it, but has not done so, and the contract contains a stipulation to convey by a good warranty deed, but contains no agreement for a covenant against incumbrances, and it appears further that the wife has not agreed to sign the contract, or in any way release her inchoate right of dower in the land, and that the purchaser at the

time knew that the vendor had a wife who would, under the law, be entitled to a right of dower, and there is no collusion between the husband and wife relating to the contract or deed, the court will not decree specific performance against the husband, with an abatement in the contract price of the land of the estimated value of the prospective dower of the wife. *People's Sav. Bank v. Parisette*, 68 O. St. 450 (67 N. E. Rep. 896; 96 Am. St. Rep. 672).

Sec. 689. Practice in actions for specific performance

—**Defenses.** The fact that a vendee after the execution of his contract of purchase takes a lease of the purchased lands from his vendor, is a bar to his enforcing specific performance of his contract of purchase. *Davis v. Williams*, 130 Ala. 530 (30 So. Rep. 488; 54 L. R. A. 749; 89 Am. St. Rep. 55). Want of mutuality in a contract is no defense to an action for specific performance, where the party not bound thereby has performed all the conditions of the contract on his part, and has brought himself clearly within its terms. *Rank v. Garvey*, Neb. (92 N. W. Rep. 1025). It is no defense against the specific performance of one's contract to sell an undivided interest in his land that his vendee might sell the interest to some undesirable person, entailing probably some disastrous suit to sell the whole property because of its indivisibility. *Moayon v. Moayon*, Ky. (72 S. W. Rep. 33; 60 L. R. A. 415; 24 Ky. Law Rep. 1641). A vendor in an auction sale of real estate against whom an action for specific performance has been brought, who, by his answer, admits the contract and fails to plead the statute of frauds cannot defeat the enforcement of the contract because not signed by him or his agent. *Gough v. Williamson*, 62 N. J. Eq. 526 (50 Atl. Rep. 323). One bidding at a judicial sale of a city lot advertised as being 100 feet front and 255 feet deep, cannot defeat specific performance on account of the lot being only 93 feet front and 255 feet deep by including the sidewalk, where it appears that he was well acquainted with the lot and his bid was not induced by a reliance upon its advertised size, although he was ignorant of the inaccuracy; he will be required to perform his contract with a deduction in price for the deficiency. *Van Blarcom v. Hopkins*, 63 N. J. Eq. 466 (52 Atl. Rep. 147). See *Baker v. Manley*, 203 Pa. St. 191 (52 Atl. Rep. 176). In an action for specific performance of a contract to purchase land, a defense based on the ground of a defective title is not established by proof that

the assessor without authority reduced the area of the land on his books. *Spoor v. Tilson*, 100 Va. 516 (42 S. E. Rep. 293).

Sec. 690. Practice in actions for specific performance—Degree of proof required. To authorize a decree for the specific performance of a contract it must be established by clear and satisfactory proof, *Chappell v. Stewart*, 95 Md. 76 (51 Atl. Rep. 411) ; *Dunn v. McGovern*, 116 Ia. 663 (88 N. W. Rep. 938) ; and where a contract concerning lands is verbal, it must be certain and unambiguous in its terms and the proof thereof must be clear and convincing in order for a court of equity to specifically enforce it. *Converse v. Brown*, 200 Ill. 166 (65 N. E. Rep. 644) ; *Knight v. Knight*, 51 W. Va. 518 (41 S. E. Rep. 905) ; *Dwight v. Jones*, 115 Ga. 744 (42 S. E. Rep. 48) ; *Briles v. Goodrich*, 116 Ia. 517 (90 N. W. Rep. 354). All the terms of an alleged parol contract to convey land must be proven by one seeking specific performance with definite certainty ; and where all the proof leaves it in doubt as to whether such an agreement was an obligatory contract or a declaration of a purpose to confer a benefit, specific performance will not be decreed. *Wolfinger v. McFarland*, N. J. Eq. (54 Atl. Rep. 862).

Sec. 691. Practice in actions for specific performance—Awarding costs in action by vendor which cures defects in his title. Costs should not be awarded either party in a vendor's action for specific performance by the adjudications in which defects in his title are cured so as to enable the court to compel its acceptance by the vendee, as marketable. *Barger v. Gery*, 64 N. J. Eq. 263 (53 Atl. Rep. 483). The court say ; "As a general rule it seems to me that any order for costs in a vendor's suit for specific performance must be made with regard to the status of the defendant, the vendee, not at the end of the suit, but at the commencement,—at the time when he refused to take the offered title. Where the suit has exercised a curative effect upon the title, and the vendee was justified under his contract in demanding that such cure should be made, the expense of the suit may be a necessary incident to the performance of the contract by the vendor. Not only should the vendee not be mulcted in the costs of the vendor, but in some cases I think the payment of the entire costs and expenses of the vendee by the vendor should be a condition upon which the decree in favor of the latter should be made. The English

rule cited by Mr. Fry (3d Am. Ed. § 876), and embodied in a dictum of Sir George Jessell in *Osborne v. Rowlett* (1880) 13 Ch. Div. 774, 798, to the effect that, even if the vendee was justified in refusing the title until decree in its favor, still he should be ordered to pay the costs 'so as to assure his title, and show that the court entertains no doubt upon it,' if there is such rule, is, in my judgment, one not to be adopted by this court. Most vendees would prefer to accept the titles forced upon them by suits which they have properly required the vendor to bring without this unsolicited and expensive 'assurance' from the court. In *Radford v. Willis*, (1871) 7 Ch. App. 7, 11, the action and declaration in regard to costs are inconsistent with the above cited supposed rule. Where the dispute over the title is about a fact ordinary, as we have seen, the decree can have little curative power. The decree in most, if not all, cases establishes the marketability of the title which the vendor offered, not merely the marketability of the title which the vendee will take as the result of the suit for specific performance. Nevertheless, the vendee in all cases is not under any obligation to search for evidence, and produce the witnesses who can establish the title of the vendor. In this case the evidence to support the offered title was not presented by the vendor to the vendee. A very important part of it was obtained by the vendor after this suit was commenced."

STARTING FIRES.

EPITOME OF CASES.

Sec. 692. Destruction of insured property—Rights of parties. In an action by the owner of property destroyed by fire, brought for the benefit of his insurers against the one by whose negligence or wrong the destruction occurred, the measure of damages is the damage resulting to his property, not exceeding the amount paid him by his insurers. *Cumberland Telegraph & Telephone Co. v. Dooley*, 110 Tenn. 104 (72 S. W. Rep. 457). A stipulation in a contract by which one is given a license to erect a building on a railroad right of way that the railroad company shall not be liable for the destruction

thereof by fire from its locomotives, is valid and binds both the licensee and the insurance company issuing to him a policy of insurance thereon. *Greenwich Ins. Co. v. Louisville & N. R. Co.*, 112 Ky. 598 (66 S. W. Rep. 411; 56 L. R. A. 477; 23 Ky. Law Rep. 2014). An owner of insured property who recovers from a railroad company by whose negligence it is destroyed cannot also have an action on the policy; and a provision in an insurance policy rendering it void "if the insured shall make or have any contract or understanding whereby any person or corporation shall not be liable for any act or negligence in causing such fire," bars a recovery on the policy by the insured for the destruction of the property by a railroad company with which he had made an agreement releasing it from any liability for the destruction of his property. *Kennedy v. Iowa State Ins. Co.*, 118 Ia. 29 (91 N. W. Rep. 831). Where a policy of insurance on property destroyed by the negligence of a railroad company provided for the subrogation of the insurer to any rights of the insured against such company, the latter cannot sue on the policy and evade a release he has executed to the railroad company for a valuable consideration, on the ground of fraud, while he retains the money paid him therefor. *Highlands v. Cumberland Valley Farmers' Mut. Ins. Co.*, 203 Pa. St. 134 (52 Atl. Rep. 130). A statute (Mass. Pub. Stat., ch. 112, § 214, as amended by Stat. 1895, ch. 293) giving a railroad company held responsible in damages for the destruction of property the right to the benefit of insurance taken out thereon by the owner, applies to a case where the insurance was taken out before the enactment of the statute. *Holmes, C. J., Loring and Hammond, JJ., dissenting. Lyons v. Boston & L. R. R.*, 181 Mass. 551 (64 N. E. Rep. 404).

Sec. 693. Liability of one starting a fire for injuries resulting therefrom. In discussing the liability of one starting a fire for injuries resulting therefrom, the supreme court of Nebraska, in the case of *Bock v. Grooms*, (Neb.) 92 N. W. Rep. 603, say: "The early rule of the common law was very harsh in its dealings with those who started a fire by which the property of another was injured or destroyed, and went almost to the extent of making them absolutely liable for all damages caused thereby. This rule was modified by the statute of 6 Anne, 31, which provided that no action should be maintained against any person in whose house or chambers any fire should accidentally begin, or any recompense be made by him

for any damages occasioned thereby. This exemption from liability was further extended by 12 Geo. III, ch. 73, and 14 Geo. III, ch. 78, to fires which originate in a stable, barn, or other building, or on the estate. Whether or not the statute extended to cases of negligence was for some time a disputed question, but it was finally settled that the statute does not extend its protection to any fires which are negligently or knowingly kindled. *Filliter v. Phippard*, 11 Q. B. 347. In this country, with few exceptions, the rule has always prevailed that one may lawfully kindle a fire on his own premises for purposes of husbandry, and that he does not become liable for injury caused by it to the property of another, in the absence of negligence in its management. *Calkins v. Barger*, 44 Barb. 424; *Clark v. Foot*, 8 Johns, 421; *Fahn v. Reichart*, 8 Wis. 255 (76 Am. Dec. 237); *Miller v. Martin*, 16 Mo. 508 (57 Am. Dec. 242); *Hanlon v. Ingram*, 3 Ia. 81; *Sweeney v. Merrill*, 38 Kan. 216 (16 Pac. Rep. 454; 5 Am. St. Rep. 734). This being the rule, we are of the opinion that one who kindles a fire on his own land is not bound to anticipate and guard against a whirlwind or any extraordinary high winds that may ensue, and such is the holding in several well-considered cases in other states. *Sweeney v. Merrill*, 38 Kan. 216 (16 Pac. Rep. 454; 5 Am. St. Rep. 734); *Miller v. Martin*, 16 Mo. 508 (57 Am. Dec. 242); *Stuart v. Hawley*, 22 Barb. 619; *Averitt v. Murrell*, 4 Jones, Law, 323."

Sec. 694. Liability of railroad companies for fires—Negligence—Statutes construed. A railroad company negligently permitting dry grass and broom straw to accumulate and remain on its right of way is liable for damages resulting from a fire started by a spark from one of its engines alighting thereon. *Shields v. Norfolk & C. R. Co.*, 129 N. C. 1 (39 S. E. Rep. 582). A railroad company is liable for damages resulting from a fire started by a spark falling from its locomotive and igniting combustible material which it had negligently and knowingly permitted to accumulate and remain on its right of way, and which spread beyond such right of way by the blowing of an ordinary wind, such wind not being a new and independent intervening cause. *Chicago & E. R. Co. v. Lesh*, 158 Ind. 423 (63 N. E. Rep. 794). Courts cannot declare it to be negligence for a railroad company to fail to use anthracite coal in its engines upon a finding that such use would lessen the danger of throwing sparks of fire from the smokestacks.

Raleigh Hosiery Co. v. Raleigh & G. R. Co., 131 N. C. 238 (42 S. E. Rep. 602).

A statute making a railroad company "liable to pay to the owner or owners for all damages which may arise from the burning of houses, wood, hay, or any other substance whatever, by fire communicated from the engines, cars or other vehicles of said corporation, or by those in their employ, damages equal to the value thereof, with all the lawful costs," establishes such liability independently of any question of negligence; and the words "owner or owners," as used in the statute, refer not alone to those whose land is bisected by the railroad bed, but apply also to those whose land is sufficiently near to the railroad bed to have their land damaged by fire communicated from engines of the railroad company. *McDonald v. New York, N. H. & H. R. Co.*, 23 R. I. 558 (51 Atl. Rep. 578). See opinion for discussion as to what roads the statute applies. Under 3 Starr & C. Ann. Ill. Stat. (2d Ed.), p. 3294, ch. 114, par. 123, proof that fire was communicated to property by a railroad engine establishes a prima facie case of negligence against the company, which casts upon it the burden of showing either that the fire was caused by some other agency, or that its engine was equipped with the best and most approved appliances to prevent the escape of fire, and was in good repair and properly and skillfully handled by a competent engineer. *Cleveland C. C. & St. L. R. Co. v. Hornsby*, 202 Ill. 138 (66 N. E. Rep. 1052). Substantially the same rule prevails in North Carolina, *Raleigh Hosiery Co. v. Raleigh & G. R. Co.*, 131 N. C. 238 (42 S. E. Rep. 602); and in Alabama, *Louisville & N. R. Co. v. Marbury Lumber Co.*, 132 Ala. 520 (32 So. Rep. 745; 90 Am. St. Rep. 917). Under Ia. Code, § 2056, providing that any corporation operating a railway "shall be liable for damages sustained by any person on account of loss or of injury to his property occasioned by fire set out or caused by the operation of such railway," it is held that upon a showing that a fire was so caused, a presumption of negligence on the part of the railroad company follows without further proof. *Kennedy v. Iowa State Ins. Co.*, 118 Ia. 29 (91 N. W. Rep. 831); *Thompson v. Keokuk & W. R. Co.*, 116 Ia. 215 (89 N. W. Rep. 975). Under Mo. Rev. Stat. 1899, § 1111, a railroad company is liable for property destroyed by fire from locomotives in use on its road regardless of negligence; but it may by contract with the owner of the property relieve itself from such liability. *Wabash R. Co. v. Ordelheide*, 172 Mo. 436 (72 S. W. Rep. 684). S. C.

Rev. Stat., § 1688, fixing the liability of railroad companies for injuries by fire, renders such a company liable for damages to land by destruction, by fire from its locomotives, of timber, growing trees and turpentine boxes. *Dent v. South-Bound R. Co.*, 61 S. C. 329 (39 S. E. Rep. 527). An engine in the possession and control of a railroad corporation operating it is "its locomotive," within the meaning of S. C. Gen. Stat., § 1511, providing that "every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines." *Bush v. Southern Ry. Co.*, 63 S. C. 96 (40 S. E. Rep. 1029).

Sec. 695. Liability of railroad companies for fires—Contributory negligence. The right of the owner of a manufacturing plant to recover against a railroad company for the destruction of buildings by fire is not affected by the character and age of the shingles on the roofs of the buildings, and their inflammable character, and whether or not he maintained any water appliances at the plant at the time of the fire. *Indiana Clay Co. v. Baltimore & O. S. W. R. Co.*, 31 Ind. App. 258 (67 N. E. Rep. 704). The court say: "A party has the right to construct buildings on any part of his property, and enjoy the same, without reference to the proximity of a railroad. Such use of his property cannot be declared contributory negligence in an action against the railroad company for negligently setting fire to the buildings. He is not required to keep his property in such condition as to guard against the negligence of the company. He may proceed upon the theory that the railroad company will not injure him by its negligence. He is not required to anticipate and take precautions against the negligence of third persons. *Pittsburg, etc., R. Co. v. Indiana, etc., Co.*, 154 Ind., at page 332 (56 N. E. Rep. 766) and cases cited; *Thompson, Com. on Neg. § 2327*; *Philadelphia, etc., R. Co. v. Hendrickson*, 80 Pa. 182 (21 Am. Rep. 97); *Cook v. Champlain Transp. Co.*, 1 Denio, 91; *Klabfleisch v. Long Island, etc., R. Co.*, 102 N. Y. 520 (7 N. E. Rep. 557; 55 Am. Rep. 832); *Burke v. Louisville, etc., R. Co.*, 7 Heisk. 451 (19 Am. Rep. 618); *Cincinnati, etc., R. Co. v. Barker*, (Ky.) 21 S. W. Rep. 347; *Kellogg v. Chicago, etc., R. Co.*, 26 Wis. 223 (7 Am. Rep. 69); *Salmon v. Delaware, etc., R. Co.*, 38 N. J. L. 5 (20 Am. Rep. 356); *Delaware, L. & W.R.Co. v. Salmon*, 39 N. J. L. 299 (23 Am. Rep. 214); *Richmond, etc.,*

R. Co. v. Medley, 75 Va. 499 (40 Am. Rep. 734); Snyder v. Pittsburg, etc., R. Co., 11 W. Va. 14 (18 Am. Ry. R. 154); Boston Excelsior Co. v. Bangor, etc., R. Co., 93 Me. 52 (44 Atl. Rep. 138; 47 L. R. A. 82); Ross v. Boston, etc., R. Co., 6 Allen, 87; Flynn v. San Francisco, etc., R. Co., 40 Cal. 14 (6 Am. Rep. 695); Vaughan v. Taff Vale, etc., R. Co., 3 H. & N. 750 (2 Sherman & Redf. on Neg. § 680); 8 Am. & Eng. Law, page 16; Chicago, etc., R. Co. v. Smith, 6 Ind. App. 262 (33 N. E. Rep. 241); Chicago, etc., R. Co. v. Kern, 9 Ind. App. 505 (36 N. E. Rep. 381); Louisville, etc., R. Co. v. Richardson, 66 Ind. 43 (32 Am. Rep. 94); Pittsburg, etc., R. Co. v. Jones, 86 Ind. 496 (44 Am. Rep. 334); Chicago, etc., R. Co. v. Burger, 124 Ind. 275 (24 N. E. Rep. 981)."

Sec. 696. Liability of railroad companies for fires—
Duties and liabilities as to selection and adoption of appliances to prevent escape of sparks. In the case of Missouri, K. & T. Ry. Co. v. Carter, 95 Tex. 461 (68 S. W. Rep. 159), supreme court of Texas say: "The testimony in this case tended to prove that each of two different kinds of spark arresters was used by railroad companies, and each was considered by experienced railroad men as better than the other, which produced a condition in which it was necessary for the railroad company to make a choice between the two. Under this state of facts, it was the duty of the railroad company to exercise ordinary care (that is, such care as a man of ordinary prudence would exercise under like circumstances) to select and use the better of the two; but, having used such care as the law requires, it cannot be held that a failure of judgment honestly exercised in an attempt to discharge the duty should render the company liable. Frankford & B. Turnpike Co. v. Philadelphia & T. R. Co., 54 Pa. 350 (93 Am. Dec. 708); Jackson v. Railroad Co., 31 Ia. 178 (7 Am. Rep. 120); Hoyer v. Railway Co., 46 Minn. 269 (48 N. W. Rep. 1117); Railway Co. v. Corn, 71 Ill. 496; Menominee River Sash & Door Co. v. Milwaukee & N. R. Co., 91 Wis. 463 (65 N. W. Rep. 176). In Frankford & B. Turnpike Co. v. Philadelphia & T. R. Co., cited above, the plaintiff asked the trial court to charge the jury as follows: 'If the defendants neglected to supply the engine which is alleged to have fired plaintiff's bridge with the best and most perfect form of spark catcher in use, for the purpose of guarding against the emission of sparks, and if, in consequence of such neglect, sparks were emitted, which fired the plaintiff's

bridge, that, without some proof of concurring neglect on the part of the plaintiffs in originating the fire, they are entitled to recover.' The court refused the requested instruction, and gave to the jury the following charge: 'The degree of care to be observed by the defendants is ordinary care, and the absence of this care, if it appear by sufficient proof, is evidence of negligence. I therefore say that if the defendants used ordinary care and skill in procuring good and safe spark arresters, such as are most in use in the country, and approved by experienced railroad operators and mechanics, they would not be required to use any other or greater care or skill in respect to the character of the spark arrester used by them.' The supreme court of Pennsylvania approved the charge given. That case presents sharply the very question that we have before us,—the necessity of a charge upon the issue as to whether the railroad company exercised ordinary care in selecting its machinery, and, if it did, should it be held liable for a failure in that particular? The opinion of the supreme court of Pennsylvania sustains the charge given, by very cogent and convincing reasons, from which we copy as follows: 'What is care in one case may be negligence in another, where the danger is greater, and more care is required. The degree of care having no legal standard, but being measured by the facts that arise, it is reasonable such care must be required which it is shown is ordinarily sufficient, under similar circumstances, to avoid the danger and secure the safety needed. Ordinary care is therefore the only rule which can be stated by a court. But as the degree of care is measured in every case by its circumstances, that which is ordinary care in a case of extraordinary danger would be extraordinary care in a case of ordinary danger, and that which would be ordinary care in a case of ordinary danger would be less than the ordinary care in a case of great danger. * * *

Care according to the circumstances being the rule, we must not overlook what the judge said upon the particular subject to which this care related. In his answer to the first point, he said, if the defendant used ordinary skill in procuring a good and safe spark catcher, such as are most in use in the country, and approved by experienced railroad operators and mechanics, they would not be required to use any other or greater skill or care in respect to the spark catcher used by them. Now, clearly, this was an application of the rule to the very case before the jury, and not to one of less danger, in which the care required would be less.' The other cases cited sustain our con-

clusion as expressed in the answer to the question. In passing upon this question, courts have usually expressed the rule without the qualification, because the facts in the case did not demand it. The standard established is that the railroad company must select the best devices in use for the purpose of arresting sparks and preventing the escape of fire from the locomotive, and it is said that a man of ordinary prudence will do so. *Jackson v. Railroad Co.*, 31 Ia. 178 (7 Am. Rep. 120)."

Sec. 697. Action for injury by fire—Complaint—Measure of damages. A complaint against a railroad company for injury to property by fire, which alleges that the company negligently permitted the fire to escape from its right of way to the land of another from which it spread to plaintiff's property, is sufficient without alleging negligence in permitting the fire to escape from the land of such third party. *Wabash R. Co. v. Lackey*, 31 Ind. App. 103 (67 N. E. Rep. 278). A complaint against a railroad company for injury to property by fire, which alleges that the injury was caused wholly by the negligence of the defendant and wholly without any fault or negligence on the part of the plaintiff, is sufficient, although it does not detail the facts constituting the defendant's negligence. *Pittsburgh, C. C. & St. L. Ry. Co. v. Wilson*, 161 Ind. 701 (66 N. E. Rep. 899). As to sufficiency of particular complaint, see *Wabash R. Co. v. Schultz*, 30 Ind. App. 495 (64 N. E. Rep. 481). In the case of the destruction of trees, turpentine boxes and undergrowth, it is held the measure of damages is the difference in the value of the land before and after the fire. *Dent v. South-Bound R. Co.*, 61 S. C. 329 (39 S. E. Rep. 527). Where a part of the property injured and destroyed consisted of fruit trees in an orchard and a hedge forming a fence, it is proper to instruct the jury that the measure of plaintiff's recovery is the amount and value of the damage to the thing injured, and the value of the thing destroyed, as an appurtenance to and part of the realty. *Kansas City, Ft. S. & M. R. Co. v. Perry*, 65 Kan. 792 (70 Pac. Rep. 876). As to measure of damages for destruction of meadow, see *Krejci v. Chicago & N. W. Ry. Co.*, 117 Ia. 344 (90 N. W. Rep. 708).

Sec. 698. Action for injury by fire—Proof of starting fire by locomotive—Circumstantial evidence. That a fire was caused by the negligent operation of a locomotive may be proved by either direct or circumstantial evidence. *Pittsburgh, C. C. & St. L. Ry. Co. v. Wilson*, 161 Ind. 701 (66 N.

E. Rep. 899). The fact that soon after the passing of an engine a fire starts near a railway track in an inclosed field, covered at the time with a growth of highly inflammable vegetation, and travels before a high wind in a direction away from the track, is sufficient to warrant a jury in finding that the fire was caused by the operation of the railroad, without its appearing that the engine emitted sparks or live cinders or was put to special exertion, and without further proof excluding other possible origins. *Kansas City, Ft. S. & M. R. Co. v. Perry*, 65 Kan. 792 (70 Pac. Rep. 876). For a similar holding, see *Abrams v. Seattle & M. Ry. Co.*, 27 Wash. 507 (68 Pac. Rep. 78). In the first case, the court say: "There is no disposition to question the rule that, in the absence of positive proof of the means of ignition, a full conviction of the fact may be generated by circumstances. *Railroad Co. v. Bales*, 16 Kan. 252; *Same v. Matthews*, 58 Kan. 447 (49 Pac. Rep. 602). But it is argued that, to establish the relation of cause and effect between the passing of the trains and the fires in question, the jury must have invaded the realm of sheer conjecture and guess. It is true that the origin of the fires must rest upon proof, and not upon possibility; but it is not true, as stated in *Musselwhite v. Receivers*, 4 Hughes, 166 (Fed. Cas. No. 9,972), that the test of the value of circumstantial evidence in cases of this character is that no other theory but the hypothesis upon which the conclusion is based can be formed. If the circumstances present a reasonably adequate cause, they will be sufficient to go to the jury, even though some other cause which may be suggested may not be excluded. In discussing the probative force of circumstantial evidence, Prof. Greenleaf says: 'In civil cases it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove.' Greenl. Ev. § 13a. And in *Railway Co. v. Balch*, 122 Ind. 583 (23 N. E. Rep. 1142), the rule is stated as follows: 'If circumstances are proved authorizing an inference in favor of the plaintiff, it is proper for the jury to draw it, and their verdict cannot be disturbed.' See, also, *Railroad Co. v. Matthews*, 58 Kan. 447 (49 Pac. Rep. 602). Can it be said, then, that the conclusion of the jury from the facts before it was legitimate? Courts of sound judgment have so decided. In the case of *Smith v. Railway Co.* (determined in the exchequer chamber) L. R. 6 C. P. 14, the facts bear considerable similarity to those involved in this case, and, as set forth in the headnote of the report, are as follows: 'Workmen employed by the defend-

ants, a railway company, after cutting the grass and trimming the hedges bordering the railway, placed the trimmings in heaps between the hedge and the line, and allowed them to remain there fourteen days, during very hot weather, which had continued for some weeks. A fire broke out between the hedge and the rails, and burnt some of the heaps of trimmings and the hedge, and spread to a stubblefield beyond, and was thence carried by a high wind across the stubblefield and over a road and burnt the plaintiff's cottage, which was situated about 200 yards from the place where the fire broke out. There was evidence that an engine belonging to the defendants had passed the spot shortly before the fire was first seen, but no evidence that the engine had emitted any sparks, nor any further evidence that the fire had originated from the engine; nor was there any evidence that the fire began in the heaps of trimmings, and not on the parched ground around them.' Upon the argument it was suggested that 'there were many other ways in which it may have begun which are equally consistent with the evidence. Thus, a fusee may have been thrown from a window of one of the carriages of the train, or one of their workmen on the line may have dropped a spark from his pipe. Where the evidence is equally consistent with the view that the defendants were liable and that they were not, there is no evidence to go to the jury.' To which Channell, B., replied: 'But here the two causes of the fire that are suggested, viz., the engine and the pipe or cigar, are not of equal probability, and there was evidence for the jury, therefore, that the fire was caused by the more probable of the two alleged causes.' It was therefore held 'that, it being a matter of common knowledge that engines do emit sparks, there was evidence for the jury that the fire originated in sparks from the engine that had just passed.' Likewise, the supreme court of Iowa, in *Johnson v. Railway Co.*, 77 Ia. 666 (42 N. W. Rep. 512), held: 'Where the evidence showed that, after defendant's engines had passed, the fires were discovered in the grass, and it was not shown that they could have arisen from any other source, the jury was warranted in finding that they were caused by the engines.' In Wisconsin the question was determined in *Abbott v. Gore*, 74 Wis. 509 (43 N. W. Rep. 365), as follows: 'The fact that an engine passed shortly before a fire was discovered on or near the right of way is some evidence tending to show, in the absence of proof of any other cause, that such engine set the fire, notwithstanding it was in good order and properly managed.'

And in the case of *Richmond v. McNeill*, 31 Or. 342 (49 Pac.

Rep. 879), the syllabus reads: 'Evidence tending to show that a railway company negligently left along its track combustible material, which was discovered to be on fire soon after the passing of a train, and plaintiff thereby suffered damage, raises an inference that the fire was caused by sparks from the engine, which the company must rebut.' Other cases illustrating the method of induction involved may be found in 13 Am. & Eng. Enc. Law, 513. See, also, *Railroad Co. v. Gibson*, 42 Kan. 34 (21 Pac. Rep. 788). In the case at bar, given the place of origin in a field devoted to the production of farm crops, and near to the railroad tracks, the inflammable character of the growth upon the soil, the close proximity in time of the passing of the train and the fire, the well-known fury of the forces in the locomotive, and the strength and direction of the wind, and no scientific or juridical process of thought could be violated in any way by inferring that the operation of the train caused the fire. The verdict of the jury, therefore, was fully warranted by the evidence."

Sec. 699. Action for injury by fire—Evidence and instructions. A person cannot be made liable for the destruction of the property of another by fire alleged to have been negligently started by him, unless his responsibility for the origin and cause of the fire be shown by evidence clear and convincing to an unprejudiced mind. The verdict in such cases cannot be upheld when based upon speculation and conjecture. *Swenson v. Erlandson*, 86 Minn. 263 (90 N. W. Rep. 534). To effect a rebuttal of the presumption of negligence laid upon a railroad company by the statute of Kansas, it must secure from the jury answers to its questions which negative every affirmative charge of negligence made in the petition. *St. Louis & S. F. Co. v. Chace*, 64 Kan. 380 (67 Rep. 853). The presumption of negligence arising against a railroad company from proof of the starting of a fire by one of its engines is held to be rebutted in Georgia where the uncontradicted evidence shows that the engine from which the sparks were emitted which caused the fire was equipped with the latest improved spark arrester, which was in good order on the date at which the fire occurred; that the engine was in all respects also in good order on that date; and that it was properly handled by the engineer in charge. *Southern Ry. Co. v. Pace*, 114 Ga. 712 (40 S. E. Rep. 723). In determining whether a fire originated from sparks from a locomotive, the evidence being circumstantial, testimony

that the weather was dry is competent. *Louisville & N. R. Co. v. Marbury Lum. Co.*, 132 Ala. 520 (32 So. Rep. 745; 90 N. W. Rep. 917). In case of the destruction of an orchard, it is proper to show the income therefrom prior to the fire. *Krejci v. Chicago & N. W. Ry. Co.*, 117 Ia. 344 (90 N. W. Rep. 708). It is not proper to admit or consider evidence of the accumulation of combustible material on the right of way of a railroad company in an action against it for fire, where the complaint contains no allegation of negligence on the part of the company in this particular. *Noland v. Great Northern Ry. Co.*, 31 Wash. 430 (71 Pac. Rep. 1098); *Southern Ry. Co. v. Horine*, 115 Ga. 664 (42 S. E. Rep. 52). Evidence of the starting of fires by other trains is admissible where the complaint does not designate any particular engine as starting the fire on account of which the suit is brought. *Noland v. Great Northern Ry. Co.*, 31 Wash. 430 (71 Pac. Rep. 1098). In an action against a railroad company for fire alleged to have originated in a collection of inflammable material which it has permitted to remain on its right of way, evidence of previous fires starting in a similar way is admissible to show the condition of the right of way. *Abrams v. Seattle & M. Ry. Co.*, 27 Wash. 507 (68 Pac. Rep. 78). It is not proper for the court to instruct the jury in regard to the duty of a railroad company as to supplying its engines with the best appliances, keeping the same in repair, and its right of way free from combustible materials, where the complaint does not charge that the fire was caused by the negligence of the company in any of these particulars. *Noland v. Great Northern Ry. Co.*, 31 Wash. 430 (71 Pac. Rep. 1098). The same principle is adhered to in *Tinney v. Central of Georgia Ry. Co.*, 129 Ga. 523 (30 So. Rep. 623). For particular cases in which the evidence was held to be such as to make the question of negligence a question for the jury, see *Thompson v. Keokuk & W. R. Co.*, 116 Ia. 215 (89 N. W. Rep. 975); *Preece v. Rio Grande W. Ry. Co.*, 24 Utah, 493 (68 Pac. Rep. 413). For cases determining particular questions as to admissibility of evidence and applicability of instructions in actions for injury by fire, see *Indiana Clay Co. v. Baltimore & O. S. W. R. Co.*, 31 Ind. App. 258 (67 N. E. Rep. 704); *Swanson v. Keokuk & W. R. Co.*, 116 Ia. 304 (89 N. W. Rep. 1088); *Kerjci v. Chicago & N. W. Ry. Co.*, 117 Ia. 344 (90 N. W. Rep. 708); *Central of Georgia Ry. Co. v. Trammell*, 114 Ga. 312 (40 S. E. Rep. 259); *Livermon v. Roanoke & T. R. Co.*, 131 N. C. 527 (42 S. E. Rep. 942); *Williams v. South-*

ern Ry. Co., 130 N. C. 116 (40 S. E. Rep. 979) ; Louisville & N. R. Co. v. Marbury Lumber Co., 132 Ala. 520 (32 So. Rep. 745 ; 90 Am. St. Rep. 917).

STATUTE OF FRAUDS.

EPITOME OF CASES.

Sec. 700. What contracts are within the statute of frauds. A release of an heir's expectancy must be in writing, so far as it affects real estate. Gary v. Newton, 201 Ill. 170 (66 N. E. Rep. 267). A contract for the exchange of land for land, or for other things than for money, is within the statute of frauds governing the sale of land. Beckman v. Mephram, 97 Mo. App. 161 (70 S. W. Rep. 1094). An oral agreement between a claimant and the one in possession that certain lands would be surrendered if a case in court was decided in favor of the claimant relates to a transfer of real estate and is within the statute of frauds. Easy Omaha Land Co. v. Hansen, 117 Ia. 96 (90 N. W. Rep. 705). Under Neb. Comp. Stat., ch. 73, § 74, a contract between the owner of lands and a broker employing the latter to make a sale thereof is required to be in writing. Allen v. Hall, 64 Neb. 256 (89 N. W. Rep. 803). An oral agreement by one to whom land is conveyed by absolute deed as security for a loan, to reconvey to the grantor on payment of the loan, is a contract for the sale of land, within the meaning of Mass. Pub. Stat., ch. 78, § 1, cl. 4, on which, by the terms of that act, "no action shall be brought." Hurley v. Donovan, 182 Ill. 64 (64 N. E. Rep. 685).

Sec. 701. What contracts are not within the statute of frauds. A contract required to be in writing may be modified by parol as to parts not required by the statute to be in writing. Rank v. Garvey, Neb. (92 N. W. Rep. 1025). A parol agreement by owners of a tract of land selling lots therein that they will construct certain streets through the tract is not within the statute of frauds. Drew v. Wiswall, 183 Mass. 554 (67 N. E. Rep. 666).

Sec. 702. Sufficiency of memorandum. The contract may be made to appear on different papers, written at different times. It is manifest that the instrument signed in this case relates to the same transaction, and, in its entirety, it is to be taken into account. *Maris v. Masters*, 31 Ind. App. 235 (67 N. E. Rep. 699). An instrument executed by the vendor to his vendee as a deed and intended by them as such, but which is inoperative as a deed for want of delivery, cannot be made to perform the service of the memorandum of a contract of sale necessary to satisfy the statute of frauds, so as to entitle the vendee to specific performance. *Wilson v. Winters*, 108 Tenn. 398 (67 S. W. Rep. 800). Citing, *Comer v. Baldwin*, 16 Minn. 172 (Gil. 151); *Parker v. Parker*, 1 Gray, 409; *Overman v. Kerr*, 17 Ia. 485; *Johnson v. Brook*, 31 Miss. 17 (66 Am. Dec. 547); *Sanborn v. Sanborn*, 7 Gray, 142; 1 Devl. Deeds, § 273; and *Brown*, St. Frauds, § 354. Ala. Code 1896, § 2152, requiring that a contract for the sale of lands must be "in writing and subscribed by the party to be charged therewith, or by some other by him thereunto lawfully authorized in writing," is not satisfied by a recital in the minute entry of a judgment, forming no part of the judgment proper, of an agreement by the parties in open court for sale by plaintiff to the defendant of the land sued for. *Robinson v. Driver*, 132 Ala. 169 (31 So. Rep. 495). Under the statute of Frauds of New Jersey (Gen. Stat., p. 1603), a memorandum of a contract for the sale of land signed only by the vendee, and which does not mention the vendor, is insufficient. *State v. Bowers*, N. J. L. (52 Atl. Rep. 218). A memorandum of a sale made by one as agent of B. L. & M. L., as follows: "Lawrence, Mass., May 12, 1902. Received of Patrick Tobin twenty-five dollars as part payment of house and land No. 10 Howard street, belonging to B. L. The price to be paid is seventeen hundred dollars (\$1,700). The lot is 100 by 120 feet. Herman Otto, Agent," was held to contain a sufficient description to satisfy the statute of frauds, although the statement that the property belonged to B. L. was erroneous; and that both of the principals of the agent were bound by the sale. *Tobin v. Larkin*, 183 Mass. 389 (67 N. E. Rep. 340). A writing executed by the accepted bidder at a decretal sale, reciting that "I have this day sold, and do by this act transfer, unto Mrs. G. M. S. a part of the land purchased by me in this action on the 21st day of August, 1899, and I hereby request the master commissioner of this court to convey same to Mrs. G. M. S.," and describing the land transferred, is

sufficient to satisfy the requirement of the statute of frauds. *Ewing v. Stanley*, (Ky.) 69 S. W. Rep. 724 (24 Ky. Law Rep. 633). A recital in a deed signed only by the grantor, by which the grantee undertakes to pay a debt of the grantor, as a part of the consideration, is not a contract in writing signed by the party charged, within the meaning of Ky. Stat., § 2515, providing that "an action upon a contract, not in writing signed by a party, express or implied, shall be commenced within five years next after the cause of action accrued." *Botkin v. Middlesboro Town & Land Co.*, (Ky.) 66 S. W. Rep. 747 (23 Ky. Law Rep. 1964). Particular memorandum of sale of land held sufficient, see *Anderson v. Wallace Lumber Mfg. Co.*, 30 Wash. 147 (70 Pac. Rep. 247).

Sec. 703. Part performance—General principles. Specific performance of a parol contract will be enforced by a court of equity where one party has wholly and the other partly performed it, and its nonfulfillment on the one hand would amount to a fraud on the party who has fully performed it. *Lucas v. Lucas*, 64 Neb. 190 (89 N. W. Rep. 769). To justify specific performance of a parol contract to convey lands on account of acts of part performance, they must be of a positive and substantial character. *Hudson v. Max Meadows Land & Imp. Co.*, 99 Va. 537 (39 S. E. Rep. 215). After an oral contract for the sale of land has become binding through part performance, the vendee cannot repudiate it and recover payments made, when the vendor is able and ready to perform. *Johnson v. Puget Mill Co.*, 28 Wash. 515 (68 Pac. Rep. 867).

Sec. 704. Part performance—Payment of purchase price—Performance of consideration by naming a child. The mere payment of money on one side as part of the consideration is not such a part performance of a parol contract to convey lands as will entitle a court of equity to decree specific performance. *Cochrane v. McEntee*, N. J. Eq. (51 Atl. Rep. 279). The payment of a part or all of the purchase money is not such part performance as will take a parol contract for the sale of land out of the statute. *Riley v. Haworth*, 30 Ind. App. 377 (64 N. E. Rep. 928).

Applying Ia. Code, § 4626, taking out of the operation of the statute of frauds contracts in which the consideration or a part thereof has been paid, it is held that a parol agreement made by one with the parents of a child to convey land to it

in consideration of the promisor being given the privilege of naming the child, is taken out of the statute by the naming of the child in accordance with such agreement. *Daily v. Minnick*, 117 Ia. 563 (91 N. W. Rep. 973; 60 L. R. A. 840). The court say: "At common law, payment of the consideration was not regarded as a part performance, so as to take the case out of the statute. *Brown*, St. Frauds, § 463; *Puterbaugh v. Puterbaugh*, 131 Ind. 288 (30 N. E. Rep. 519; 15 L. R. A. 341); *Townsend v. Huston*, 1 Har. (Del.) 532 (27 Am. Dec. 745) and cases cited. The reason for this was that nothing was regarded which did not put the party performing in such a position that a fraud would be allowed to be practiced on him if the contract was not enforced. The money or the purchase price could be recovered back, and the parties thus restored to their original position. This rule has not received universal assent in this country. *Rhodes v. Rhodes*, 3 Sandf. Ch. 279. It fully explains the holding, however, in *Madison v. Alderson*, 8 App. Cas. 467; *Ellis v. Carey*, 74 Wis. 176 (42 N. W. Rep. 252; 4 L. R. A. 55; 17 Am. St. Rep. 125); and other like cases. In this state and in Delaware, however, the statute, in express terms, makes an exception where the purchase money, or any part thereof, has been paid. It then becomes important to determine what is meant by 'purchase money.' That has been settled by numerous previous decisions of this court. Thus, in *Devin v. Himer*, 29 Ia. 297, it is held that such term means the consideration received, in whatever form it may exist. See, also, *Mitchell v. Colby*, 95 Ia. 202 (63 N. W. Rep. 769). In many cases the performance of services has been held to be the payment of the purchase price. *Bonnon v. Urton*, 3 G. Greene, 228; *Stem v. Nysonger*, 69 Ia. 512 (29 N. W. Rep. 433); *Franklin v. Tuckerman*, 68 Ia. 572 (27 N. W. Rep. 759), and cases cited. The cancellation of a pre-existing indebtedness has also been held to be part payment. *Peake v. Conlan*, 43 Ia. 297. At common law neither marriage nor the performance of services was sufficient to take the case out of the statute. *Wallace v. Long*, 105 Ind. 522 (5 N. E. Rep. 666; 55 Am. Rep. 222); *Peek v. Peek*, 77 Cal. 106 (19 Pac. Rep. 227; 1 L. R. A. 185; 11 Am. St. Rep. 244); *Ducie v. Ford*, 8 Mont. 233 (19 Pac. Rep. 414); *Maddison v. Alderson*, 8 App. Cas. 467."

Sec. 705. Part performance—Marriage. Construing and applying 2 N. Y. Rev. Stat., pp. 135, 136, ch. 7, tit. 2, §§ 2, 8, providing that "every agreement or undertaking made

upon consideration for marriage, except mutual promises to marry," shall be void unless such agreement or undertaking, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith, or his agent, it is held that marriage in pursuance of a parol antenuptial contract to transfer and convey certain property, made in consideration of a promise of marriage, is not such part performance as will remove the contract from the ban of the statute and authorize its specific performance. *Hunt v. Hunt*, 171 N. Y. 396 (64 N. E. Rep. 159; 59 L. R. A. 306). In Colorado it is held that where a woman is induced to marry a man by his parol agreement to convey land to her, which he fails to do, the contract is taken out of the statute on account of his fraud. *Allen v. Moore*, 30 Colo. 307 (70 Pac. Rep. 682).

Sec. 706. Part performance—Taking possession and making improvements. Where a parent makes a parol promise to a child to convey a tract of land if the child will take possession of, reside upon, and improve the same, and in reliance upon the promise the child takes possession and makes improvements of a permanent and valuable character, a court of equity will decree specific performance of the agreement. *Horner v. McConnell*, 158 Ind. 280 (63 N. E. Rep. 472). Since the enactment of the Va. Code, § 2413, a donee of land under a parol gift does not acquire any right to a conveyance by his taking possession of and improving the land. *Nicholas v. Nicholas*, 100 Va. 660 (42 S. E. Rep. 669). In North Carolina it is held that a contract for the sale of land by the vendor only, under which the vendee has taken possession, is within the statute of frauds, and the vendor cannot recover the purchase price of the vendee. *Love v. Atkinson*, 131 N. C. 544 (42 S. E. Rep. 966). If one is already in possession of land under a contract of lease, his continuance in that possession will not be sufficient to support a claim of part performance under a subsequent contract of purchase. *Hutton v. Doxsee*, 116 Ia. 13 (89 N. W. Rep. 79). One who enters into a contract to sell land to a corporation can not avail himself of the statute of frauds where improvements far exceeding the value of the land were made with his knowledge and participation, and in reliance on the contract, although he did not at the time have title to or possession of the property he contracted to sell, and on which the improvements were made. *Coleridge Creamery Co. v. Jenkins*, Neb. (92 N. W. Rep. 123).

Sec. 707. Parol gifts or sales of real estate. In order for a son to enforce against the other heirs of his father a parol contract made by the latter with such son to give him land in consideration of services rendered, on the ground that he had performed the services and made improvements on the land, it is necessary for the son to show a contract in clear, definite, and unequivocal terms with his father to give or convey to him the particular piece of land, by evidence so cogent and satisfactory as to leave no room for reasonable doubt; and in like manner and by like evidence to satisfy the mind and conscience of the chancellor that the improvements made by him on the place were the result of such agreement, made in pursuance and on account thereof, and but for it they would not have been made, and that refusal to enforce the contract would operate as a fraud. *Goodin v. Goodin*, 172 Mo. 40 (72 S. W. Rep. 502). For particular evidence held insufficient to uphold a contract of this character, see *Handley v. Handley*, 115 Ia. 151 (88 N. W. Rep. 346). Where one who was in possession of real estate under a parol contract from his father to convey the land to him if he would move on and improve the land, having performed the terms of the parol contract, subsequently, without intending to waive any of his rights, but without being induced by fraud, signed a contract with his father, by which contract he became a tenant of the latter, closing all former controversies and disputes, and in which contract the land is spoken of as the father's land, and in which the lessees covenant "to take good care of the farm, as if it were their own," and also covenant to abide by and with the contract, the signing of and acceptance under the lease by the lessee is a waiver of his rights under the parol contract to convey, and he is not entitled to specific performance of such parol contract. *Unger v. Unger*, 65 O. St. 495 (63 N. E. Rep. 67).

STATUTE OF LIMITATIONS.

EPITOME OF CASES.

Sec. 708. Application of the statute of limitations—
General principles. The statute of limitations barring actions for relief from fraud or mistake cannot be relied on to perfect the title of a voluntary grantee who has never been in possession, as against a subsequent purchaser for value without notice of his claim. *Sewell v. Nelson*, Ky. (67 S. W. Rep. 985; 23 Ky. Law Rep. 2438). For exhaustive collation of authorities on "Effect of the bar of the statute of limitations," see 95 Am. St. Rep. 656-679. For exhaustive note on "Estoppel to plead statute of limitations," see 95 Am. St. Rep. 411-424.

Sec. 709. As to when the statute begins to run. The mere recording by a grantee of a deed to him, possession of which he has obtained without right, is not such notice to the grantor of the grantee's assertion of any rights thereunder as will start the statute of limitations running against such grantor. *Van Auken v. Minzer*, (Neb.) 90 N. W. Rep. 637. An abutting owner's cause of action against a city for damages, on account of its overflowing his lot by the raising of the grade of the street, accrues at the time of the making of the change of grade. *Hay v. City of Lexington*, Ky. (71 S. W. Rep. 867; 24 Ky. Law Rep. 1495). The right of a land owner to maintain an action against a railroad company for overflowing his land by its construction of an embankment in a city street, under a municipal ordinance, accrues at the time of the injury, and not at the time of the construction of the embankment; and an adverse user asserted as the basis of a prescriptive right to maintain such overflow must continue for the prescriptive period from the time of such injury. *Kelley v. Pittsburg, C. C. & St. L. Ry. Co.*, 28 Ind. App. 457 (63 N. E. Rep. 233; 91 Am. St. Rep. 134). An action for damages against a railroad company authorized by a municipal ordinance

to lay two tracks in a street, for damages resulting from the laying of the second track, accrues at the time of the laying of the track and not at the date of the ordinance conferring upon the company the right to lay such track. *Calumet & C. Canal & Dock Co. v. Morawetz*, 195 Ill. 398 (63 N. E. Rep. 165). The cause of action for the injury for the subsidence of the surface over a mine arises, so as to start the running of the statute of limitations, at the time of the removal of the support, and not that of the resulting subsidence. *Noonan v. Pardee*, 200 Pa. St. 474 (50 Atl. Rep. 255; 55 L. R. A. 410; 86 Am. St. Rep. 722). The statute of limitations begins to run against an action against a recorder for a mistake made by him in recording a description in a mortgage of real estate at the time the erroneous record is made, although neither he nor the mortgagee in such mortgage knew of such mistake until the recording of a second mortgage against which the mortgage erroneously recorded was invalid on account of the officer's error. *State v. Walters*, 31 Ind. App. 77 (66 N. E. Rep. 182). The statute of limitations does not begin to run against an action to reform a conveyance by correcting an error of omission in the description therein until the mistake is discovered, or some occasion has arisen whereby it might have been discovered, by reasonable diligence. *Carter v. Leonard*, Neb. (91 N. W. Rep. 574). The statute of limitations will not begin to run against an action for specific performance in favor of a vendee who has performed his part of a contract of sale as long as he remains in possession. *Fleischman v. Woods*, 135 Cal. 256 (67 Pac. Rep. 276). An action for an injury to an orchard by the operation of a smelter near by accrues when the damage actually occurs, and not at the time of the erection of the smelter, and, under Bal. Ann. Wash. Codes & Stat., § 4805, such action must be brought within two years. *Sterrett v. Northport Min. & Smelting Co.*, 30 Wash. 164 (70 Pac. Rep. 266). A cause of action in favor of a surety on an administrator's bond against his cosurety to set aside a conveyance by the latter as fraudulent, does not accrue until final settlement of the administration. *Washington v. Norwood*, 128 Ala. 383 (30 So. Rep. 405). A vendee's cause of action to recover purchase money paid does not accrue so as to start the statute of limitations until there has been a refusal to perform the contract on the part of the vendor or his representatives. *Lyttle v. Davidson*, (Ky.) 67 S. W. Rep. 34 (23 Ky. Law Rep. 2262). A cotenant's right of action for contribution on

account of his having paid more than his share of the purchase price does not accrue, so as to start the statute of limitations, until suit for partition is brought. *Grove v. Grove*, 100 Va. 556 (42 S. E. Rep. 312).

Sec. 710. As to when the statute begins to run—Action to set aside deed fraudulent as to creditors—Recording deed as notice of fraud. An attorney's knowledge of the fraudulent character of a conveyance by a debtor against whom he holds a claim for collection will be imputed to his client and constitutes such a discovery of the fraud as will start the statute of limitations (2 Bal. Wash. Codes & Stat., § 4800) running against the action by the latter to set aside the conveyance. *Deering v. Holcomb*, 26 Wash. 588 (67 Pac. Rep. 240). The constructive notice arising from the recording of a conveyance fraudulent as to creditors is not of itself sufficient to start the statute of limitations to running against an action to set it aside. *Chinn v. Curtis*, (Ky.) 71 S. W. Rep. 923 (24 Ky. Law Rep. 1563); *Wilhoit v. Musselman*, (Ky.) 72 S. W. Rep. 1112 (24 Ky. Law Rep. 2011); *Forsyth v. Easterday*, 63 Neb. 887 (89 N. W. Rep. 407); *State Bank of Pender v. Frey*, (Neb.) 91 N. W. Rep. 239.

In construing a provision in a statute of limitations on actions for relief on the ground of fraud, that "the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud," it is held by the supreme court of Ohio, in applying this statute to an action to set aside a deed constructively fraudulent as to the creditors of the grantor, that the clause does not contemplate a constructive discovery, and the cause of action does not accrue when the fraudulent deed is filed for record, unless the plaintiff then receives actual notice of its execution, and of the circumstances which render it fraudulent. *Stivens v. Summers*, 68 O. St. 421 (67 N. E. Rep. 884). The court say: "A statute providing that, in an action for relief on the ground of fraud, the cause of action shall not be deemed to have accrued until the discovery of the fraud, distinguishes itself from one which suspends the bar of the statute because of the fraudulent concealment of the cause of action; and this case involves no consideration arising out of the relation of trustee and beneficiary. When not influenced by peculiar provisions of recording acts, the view generally taken is that the registration of a deed does not operate retrospectively, so as to affect the holders of antecedent rights. *Pomeroy*,

Equity Jurisprudence, §§657, 658. This view has been consistently maintained in this state. *Leiby's Ex'rs v. Wolf*, 10 Ohio, 83, and cases following it; *Sharp v. Myers*, 1 Cir. Dec. 374; 2 Cir. Ct. R. 82, approved by this court in affirming the judgment. If we felt at liberty to depart from this doctrine, and to assume that the recording act affords a refuge to a fraudulent grantor or his fraudulent grantee, another difficulty would be encountered. Assuming that the plaintiff was charged with knowledge of these deeds when they were left for record, and of the fact that they were by way of gift, knowledge of essential elements of fraud would still be wanting. Such a deed by one who retains property fully sufficient to discharge his debts is not a fraud upon his creditors. Since the action could not be maintained but for the facts found respecting the financial condition of the grantor at the time of making the deeds, and since the record did not disclose those facts, it cannot be said that the fraud was discovered until the plaintiff, from a different source, received notice of such facts. A deed fraudulent as to creditors may recite the payment of a full and valuable consideration by the grantee, and an examination of the record would not disclose to a creditor of the grantor that a cause of action has accrued in his favor. It would inform him that the land conveyed cannot be subjected to the payment of his claim, because a valid title thereto has become vested in a purchaser for value. In such case it cannot be said that the fraud has been discovered until the creditor has notice of the falsity of the recitation as to the consideration."

In construing Kan. Civ. Code, § 18, par. 3, which is identical with the statute of Ohio construed above, the supreme court of Kansas, in the case of *Black v. Black*, 64 Kan. 689 (68 Pac. Rep. 662), say: "While we do not find the precise question determined by this court in any adjudicated case, the general, and, as we think, the correct, rule, is that the language employed in the statute, 'until discovery of the fraud,' does not mean until the party complaining had actual knowledge of the fraud alleged to have been committed, but that constructive notice of the fraud is sufficient to set the statute in motion, even though there is no actual notice, and that where the means of discovery lie in public records required by law to be kept, involving the very transaction in hand, and the interests of the parties to the litigation, in such case the public records themselves are sufficient notice of the fraud to set the statute in motion. Mr. Wood, in his work on Limitations (3d Ed. p.

661, § 276), says: 'It is an invariable rule that the fraud must have been one which was concealed from the plaintiff by the defendant, or which was of such character as necessarily implied concealment. And when the acts which are claimed to constitute the fraud are evidenced by public record or by judicial proceedings, it cannot be claimed that there was such a concealment as would prevent the operation of the statute.' In 19 Am. & Eng. Enc. Law, 251, subject, 'Limitation of Actions,' it is said: 'Where the transaction is a matter of public record, either through conveyance registered as required by law, or through other means, so that the party contending has abundant means of finding out the facts of the transaction and its nature, there can be no concealment; and he will be charged with notice of the transaction, and of facts which a diligent investigation thereof would develop. A party must be presumed to know what by the exercise of reasonable diligence he might have discovered; and when the fundamental facts upon which the alleged fraud rests are matters of public record open to inspection, he will not be permitted to plead ignorance of the fraud in order to evade the operation of the statute.' Mr. Justice Miller, in *Norris v. Haggin*, 136 U. S. 386 (10 Sup. Ct. Rep. 942; 34 L. Ed. 424), held: 'It is a part of the general doctrine that, to avoid the lapse of time or statute of limitation, the fraud must have been one which was concealed from the plaintiff by the defendant, or which was of such a character as necessarily implied concealment. Neither of these principles can apply to defendants in this case. The acts which constitute the fraud as alleged in the bill were open and public acts. The note and the mortgage were recorded in the proper public office in the proper county. The possession of the defendants was obtained by judicial proceedings which were open to everybody's examination, and which were probably well known in the entire community. The very circumstance that in 1869 the plaintiff consulted a lawyer upon the subject shows that he was aware of the fact that defendants were contesting his right to the property, and that, if he had made any inquiry at all, he must have known of the proceedings on which they rested their title.' In *Laird v. Kilbourne*, 70 Ia. 83 (30 N. W. Rep. 9), it is held: 'An action to set aside a fraudulent conveyance of real estate is barred in five years after the fraud is discovered, and it is conclusively presumed to be discovered, when the fraudulent conveyance is filed for record.' In the opinion, Mr. Justice Beck says: 'In such cases the

causes of action do not accrue "until the fraud shall have been discovered by the party aggrieved." Section 2530, Miller's Code. The fraud will be discovered when the fraudulent act is revealed,—made known to the party aggrieved. Notice or knowledge of the act is a discovery of the fraud. The act which is the very foundation of the fraud alleged in this case—indeed, which itself constitutes the fraud complained of—was the deed of Kilborne to his wife. Plaintiff is chargeable with notice of this act by the recording of the deed. *Gebhard v. Sattler*, 40 Ia. 152; *Bishop v. Knowles*, 53 Ia. 268 (5 N. W. Rep. 139). See, also, *Gardner v. Cole*, 21 Ia. 205. The law presumes that plaintiff had notice of the deed to the wife from the day it was filed for record. This deed is the very foundation—the heart—of the fraud alleged as the cause of plaintiff's action. The law therefore holds that plaintiff discovered the fraud when she had notice of the deed.' In *Francis v. Wallace*, 77 Ia. 373 (42 N. W. Rep. 323), it is held: 'Fraud in the conveyance of a minor's land by his guardian under order of court is presumed to be discovered when the deed is filed for record; and the ward cannot maintain an action to set it aside, seven years after reaching his majority, and after it would otherwise be barred by the statute of limitations, on the ground that he did not sooner discover the fraud.' To like effect is *Hecht v. Slaney*, 72 Cal. 363 (14 Pac. Rep. 88); *Smith v. Talbott*, 18 Tex. 774; *Nudd v. Hamblin*, 8 Allen, 130; *Manning v. Tin Co.*, (C. C.) 9 Fed. Rep. 726."

Sec. 711. As to when the statute begins to run—Action to remove cloud from title. In Nebraska it is held that a cause of action to remove a cloud from the title to real estate accruing to one in possession thereof is a continuing cause of action and is not barred by lapse of the statutory period of limitation after the date of the creation of the cloud. *Batty v. City of Hastings*, 63 Neb. 26 (88 N. W. Rep. 139). The court say: "Where a plaintiff out of possession brings the statutory action to quiet title, it is undoubtedly true that the statute begins to run from the time when defendant's possession became adverse. But, while a cause of action clearly accrues to the owner of real property in possession thereof whenever a cloud upon his title is created, or an adverse title asserted, we do not think it necessarily follows that such cause of action accrues then once for all, so as to start the statute of limitations

from that date. A cloud upon a title must always continue to operate as such during the period of its existence, and, as its effect upon the title is continuing, the cause of action resting on the right of the owner to have it removed would seem to be continuing also, and to be available at all times while the cloud remains. *Miner v. Beekman*, 50 N. Y. 337. 'The cause of action is not the creation of the cloud, but its existence, its effect upon the title of the owner, and his right to have it removed.' *Schoener v. Lissauer*, 107 N. Y. 111, 117 (13 N. E. Rep. 741, 743). Hence there would seem good ground for holding that lapse of time after the creation of a cloud upon a title will not bar an action by an owner in possession to have it removed. *Quinn v. Kellogg*, 4 Colo. App. 157 (35 Pac. Rep. 49); *Immigrant Co. v. Fuller*, 83 Ia. 599 (50 N. W. Rep. 48); *Hendrickson v. Boreing*, (Ky.) 32 S. W. Rep. 278; *Wagner v. Law*, 3 Wash. 500 (28 Pac. Rep. 1109; 29 Pac. Rep. 927; 15 L. R. A. 784; 28 Am. St. Rep. 56). The contrary view has been taken in Indiana,—*Eve v. Louis*, 91 Ind. 457,—and perhaps by other courts, but we prefer to follow the rule established in New York, and to hold that, where the plaintiff is in possession, he may sue to remove the cloud at any time during its existence."

Sec. 712. As to when the statute begins to run—Actions on covenants. Substantial damages not being recoverable on a covenant against incumbrances until the incumbrance is enforced, the cause of action for damages does not accrue until that time so as to start the statute to running, although the existence of the incumbrance at the time the covenant was made constituted such a breach as authorized the recovery of nominal damages. *McClure v. Dee*, 115 Ia. 546 (88 N. W. Rep. 1093; 91 Am. St. Rep. 181). For application of same principle to breach of covenant of seisin and warranty, see *Foshay v. Shafer*, 116 Ia. 302 (89 N. W. Rep. 1106). In the case of *McClure v. Dee*, the court say: "In *Knadler v. Sharp*, 36 Ia. 234, it is said: 'The true rule in such cases, doubtless, is that the covenant against incumbrances is broken upon the making of the conveyance, so that the grantee might then maintain an action and recover nominal damages; but such an action and recovery would not defeat or prevent another action by that grantee, or by the grantee of that grantee, however remote, when and after either had been required to discharge the incumbrance in order to protect his title. The breach as to the amount thus required to be paid would not

occur until the payment, and then in favor of the party holding the title and making the payment.' This doctrine has support in other decisions of this court in which it is held that the technical breach of covenant against incumbrances entitles one to but nominal damages, and a substantial recovery only can be had upon the satisfaction of the lien. *Norman v. Winch*, 65 Ia. 263 21 N. W. Rep. 598; *Nosler v. Hunt*, 18 Ia. 212. It is also sustained by decisions of courts of other states. *Cheney v. Straube*, 35 Neb. 521 (53 N. W. Rep. 479); *Wyatt v. Dunn*, 93 Mo. 459 (2 S. W. Rep. 402; 6 S. W. Rep. 273); *Hunt v. Marsh*, 80 Mo. 396; *Guerin v. Smith*, 62 Mich. 369 (28 N. W. Rep. 906); *Post v. Campau*, 42 Mich. 98 (3 N. W. Rep. 277). In the last-mentioned case, Mr. Justice Cooley, speaking for the court, says: 'The doctrine that the statute shall run from the technical breach makes the covenant in many cases a mockery. If the incumbrance consists of a mortgage having many years to run, the covenantee has no right to pay it off until it falls due and the fiction of a right to present action would defeat substantial redress.'"

Sec. 713. Interruption or suspension of statute—Acknowledgment of or payments on debt. Acknowledgment of a debt will interrupt the course of prescription, but a mere acknowledgment of the existence of the debt will not operate as a renunciation of an acquired prescription. Succession of *Slaughter*, 108 La. 492 (32 So. Rep. 379). A writing which mentions the fact that the writer had made a mortgage, and suggests to the holder ways in which he might escape loss by taking care of the property mortgaged, is not such "an acknowledgment of an existing liability, debt or claim" as will prevent the running or remove the bar of the statute of limitations upon the note secured by such mortgage. *Haythorn v. Cooper*, 65 Kan. 338 (69 Pac. Rep. 333). As against a purchaser of mortgaged premises at an execution sale thereof, the running of the statute of limitations against the mortgage cannot be interrupted by a partial payment by the mortgagor on the debt, though made before the expiration of the period of redemption from the execution sale. *Raymond v. Bales*, 26 Wash. 483 (67 Pac. Rep. 269). Where the wife's joinder with her husband in the execution of a mortgage on the homestead to secure his debt simply amounts to a waiver of her homestead rights, payments made by the husband may operate to keep the mortgage alive as against a plea of statute of limitations. *Rob-*

erts v. Roberts, 10 N. Dak. 531 (88 N. W. Rep. 289). In Kansas it is held that a mortgage given by a husband and wife on the homestead to secure his note may be kept alive by his written acknowledgments of the debt or payments thereon, though made without her knowledge and consent. *Skinner v. Moore*, 64 Kan. 360 (67 Pac. Rep. 827; 91 Am. St. Rep. 244); *Fuller v. McMahan*, 64 Kan. 441 (67 Pac. Rep. 828). The same is held where the mortgage was given on the separate property of the wife to secure a joint note of her and her husband. *Cooper v. Haythorn*, Kan. (68 Pac. Rep. 1069).

Sec. 714. Interruption or suspension of statute—Absence from state—Disabilities. The absence from the state of the mortgagor and maker of a note secured by a mortgage does not stop the running of the statute of limitations in favor of his subsequent grantee who is not obliged to pay the debt. *George v. Butler*, 26 Wash. 456 (67 Pac. Rep. 263; 57 L. R. A. 396; 90 Am. St. Rep. 756). See opinion for discussion of this subject. But this rule does not apply where the grantee's deed was not recorded within the limitation period, and the mortgagee had no notice of it. *Denny v. Beeman*, 26 Wash. 469 (67 Pac. Rep. 268; 90 Am. St. Rep. 766). In Arkansas the statute of limitations does not bar an action by a married woman to recover land, where she was married at the time of the acquisition of her title and continued so until the bringing of the action. *McFarlane v. Grober*, 70 Ark. 371 (69 S. W. Rep. 56; 91 Am. St. Rep. 84). Applying N. C. Code, § 163, it is held that a wife's right to an action for trespass on land held by her and her husband as tenants by entireties is not barred until the statutory period after his death. *Spruill v. Branning Mfg. Co.*, 130 N. C. 42 (40 S. E. Rep. 824).

Sec. 715. Laches—General principles and particular cases. The defense of laches cannot be imposed by demurrer. *Gleason v. Carpenter*, 74 Vt. 399 (52 Atl. Rep. 966). The doctrine of laches cannot be applied to a plaintiff who is not asking any equitable relief, but who seeks only to enforce a plain legal title in an action at law not barred by the statute of limitations. *McFarlane v. Grober*, 70 Ark. 371 (69 S. W. Rep. 56; 91 Am. St. Rep. 84). Laches will not be imputed to one simply because he fails to keep watch of the records to guard against the chance of the recording of a forged or stolen deed. *Van Auken v. Minzer*, (Neb.) 90 N. W. Rep. 637. Laches

cannot be imputed to one in the peaceable possession of land under an equitable title for delay in resorting to a court of equity for protection against the legal title, since possession is notice of equitable rights, and he need assert them only when he finds occasion to do so. *Nutter v. Brown*, 51 W. Va. 598 (42 S. E. Rep. 661). Citing, *Weekly v. Hardesty*, 48 W. Va. 39 (35 S. E. Rep. 880); *Coal Co. v. Doran*, 142 U. S. 417 (12 Sup. Ct. Rep. 239; 35 L. Ed. 1063); *Ruckman v. Cory*, 129 U. S. 387; (9 Sup. Ct. Rep. 316; 32 L. Ed. 728); *Mills v. Lockwood*, 42 Ill. 111, 118; *Maders v. Lawrence*, 49 Hun. 361 (2 N. Y. Supp. 159); *Wiswall v. Hall*, 3 Paige, 313; *Hall v. Erwin*, 60 Barb. 349. The right of one to assert his interest in lands of which he holds joint possession with another is not lost by his laches while such possession continues. *Brumback v. Brumback*, 198 Ill. 66 (64 N. E. Rep. 741). The claim of a plaintiff in a suit for possession of land is not barred by laches, where it appears that the land remained wild and unoccupied until shortly before the commencement of the suit; there being no need for resort to legal remedies until an interference with the possession. *Penrose v. Doherty*, 70 Ark. 256 (67 S. W. Rep. 398). During her life, laches cannot be imputed against remaindermen for failure to terminate by assignment of dower a widow's quarantine rights claimed by one to whom she has assigned them. *Graham v. Stafford*, 171 Mo. 692 (72 S. W. Rep. 507). For particular fact cases illustrating the application of the doctrine of laches, see *Quairoli v. Italian Beneficial Society*, 64 N. J. Eq. 205 (53 Atl. Rep. 622); *Bishop v. Thompson*, 196 Ill. 206 (63 N. E. Rep. 684); *Wilcoxon v. Wilcoxon*, 199 Ill. 244 (65 N. E. Rep. 229); *Becht v. Becht*, 168 Mo. 525 (68 S. W. Rep. 881); *Gay v. Havermale*, 27 Wash. 390 (67 Pac. Rep. 804); *Mantle v. Speculator Min. Co.*, 27 Wash. 473 (71 Pac. Rep. 665).

Sec. 716. Statute of limitations as applied to trusts.

As between the trustee of an express trust and the cestui que trust, the statute of limitations commences to run from the date of the disavowal of the trust by the trustee, and knowledge of such disavowal by the cestui que trust. *Mantle v. Speculator Min. Co.*, 27 Mont. 473 (71 Pac. Rep. 665) When a trust is imposed by law, as in the case of a resulting trust, the statute begins to run in favor of the holder of the legal title against the equitable owner at the time of the conveyance, if there is no recognition of the cestui's rights; if his rights are

recognized, then at the time when the holder of the legal title begins to hold adversely. *Haney v. Legg*, 129 Ala. 619 (30 So. Rep. 34; 87 Am. St. Rep. 81). The statute of limitations does not run against the cestui que trust in a trust resulting in his favor, under Cal. Civ. Code, § 853, on account of his payment of the consideration for land conveyed to the trustee, so long as the trustee does not repudiate the trust. *Faylor v. Faylor*, 136 Cal. 92 (68 Pac. Rep. 482). Implied trusts are within the statute of limitations, and the statute begins to run from the time the wrong was committed by which the person becomes chargeable as trustee by implication. *Beecher v. Foster*, 51 W. Va. 605 (42 S. E. Rep. 647). The sale of land by one holding it as trustee ex maleficio starts the statute of limitations to running against the enforcement of the trust. *Blackledge v. Blackledge*, Ia. (91 N. W. Rep. 818).

STATUTORY PROVISIONS.

[In Vol. V, §§ 841-888; Vol. VI, §§ 868-885; Vol. VII, §§ 768-781; Vol. VIII, §§ 785-800; Vol. IX, §§ 759-773, will be found a compilation of the statutory provisions of the several states and territories concerning the limitations of the various actions affecting real estate. Below we give such amendments, changes and additional constructions as have been made.]

Sec. 717. Alabama.

(See Vol. V., § 841.)

An action to set aside a fraudulent conveyance of lands at the suit of an existing creditor of the grantor is a suit in equity for the recovery of lands, and is governed by the statute of limitations of ten years. Code 1896, § 674. *Washington v. Norwood*, 128 Ala. 383 (30 So. Rep. 405.)

Sec. 718. California.

(See Vol. V., § 844; Vol. VI, § 867; Vol. VII, § 769; Vol. VIII, § 786; Vol. IX, § 759.) Code Civ. Proc., § 518 applies to suits in equity as well as actions at law. *Mantle v. Speculator Min. Co.*, 27 Mont. 473 (71 Pac. Rep. 665.) An action to set aside a conveyance as a fraud on creditors is barred by the lapse of three years after all the transactions were known to the plaintiff. *Tully v. Tully*, 137 Cal. 600 (69 Pac. Rep. 700). Code Civ. Proc. § 338 subd. 4 requiring an action to obtain relief on the ground of mistake to be brought within three years after discovery of the facts constituting the mistake applies to an action to reform a deed on the ground of mistake. *City of Eureka v. Gates*, 137 Cal. 89 (69 Pac. Rep. 850). Code Civ. Proc., § 338 construed and ap-

plied—limitation on “action for relief on the ground of fraud or mistake.” *Kenney v. Parks*, 137 Cal. 527 (70 Pac. Rep. 556).

Sec. 719. Illinois.

(See Vol. V, § 851; Vol. VIII, § 788.) Applying Hurd's Rev. Stat. 1899, p. 1117, §§ 1, 2, par. 5, it is held that an action to recover land from a vendee entering into possession thereof under a contract for a deed and giving his note for the purchase price, is barred after he has retained possession of the land for twenty years subsequent to his default in payment of the purchase price. *Richards v. Carter*, 201 Ill. 165 (66 N. E. Rep. 343).

Sec. 720. Indiana.

(See Vol. V, § 852; Vol. VI, § 869; Vol. VIII, § 789; Vol. IX, § 761.) Under Burns' Rev. Stat., § 293, subd. 3, an action by an abutting owner against a railroad company for damages resulting to his property from the construction and operation of its road in the street is barred in six years from the construction of the road. *Southern Indiana R. Co. v. Brown*, 30 Ind. App. 684 (66 N. E. Rep. 915).

Sec. 721. Iowa.

(See Vol. V, § 853; Vol. VIII, § 790; Vol. IX, § 762.) Where, in order to establish the necessary title to maintain an action for partition and to quiet title, it is necessary for the plaintiffs therein to invalidate a certain patent on the ground of fraud, the five-year limitation for actions for relief on the ground of fraud prescribed by Code 1873, § 2529, applies, regardless of the form of the action. *Murray v. Quigley*, Ia. (92 N. W. Rep. 869).

Sec. 722. Kentucky.

(See Vol. V, § 855; Vol. VII, § 772; Vol. VIII, § 791; Vol. IX, § 763.) A widow's action for allotment of dower accrues on her husband's death and is barred in fifteen years from that time. *Winchester v. Keith* (Ky.) 70 S. W. Rep. 664 (24 Ky. Law Rep. 1033). A recital in a deed signed only by the grantor, by which the grantee undertakes to pay a debt of the grantor, as a part of the consideration, is not a contract in writing signed by the party charged, within the meaning of Ky. Stat., § 2515, providing that “an action upon a contract, not in writing signed by a party, express or implied, shall be commenced within five years after the cause of action accrued.” *Botkin v. Middlesboro Town & Land Co.* (Ky.), 66 S. W. Rep. 747 (23 Ky. Law Rep. 1964).

Sec. 723. Minnesota.

(See Vol. V, § 861; Vol. VI, § 873.) Gen. Stat. 1894, § 5136, applies to an action to set aside a conveyance because fraudulent as to creditors, and such an action must be brought within six years from

the discovery of the fraud. *Brasie v. Minneapolis Brewing Co.*, 87 Minn. 456 (92 N. W. Rep. 340; 94 Am. St. Rep. 907). Gen. Stat. 1894, § 6028, is amended so as to read: "Every mortgage of real estate heretofore or hereafter executed containing therein a power of sale, upon default being made in any condition of said mortgage, may be foreclosed by advertisement within fifteen (15) years after the maturing of such mortgage or the debt secured thereby in the cases and in the manner hereinafter specified, and said fifteen (15) years shall not be enlarged or extended by reason of any non-residence nor by reason of any payment or payments made or applied upon the debt secured by such mortgage after the maturity of said debt." Laws 1903, p. 17.

Sec. 724. Nebraska.

(See Vol. V, § 865; Vol. VI, § 876; Vol. VII, § 775; Vol. VIII, § 794; Vol. IX, § 766.) An action for dower in the district court is within the statute of limitations, and must be brought within 10 years from the time it accrued. *Beall v. McMenemy*, 63 Neb. 70 (88 N. W. Rep. 134; 93 Am. St. Rep. 427). Where an action is brought for relief on the ground of fraud after a lapse of four years from the date of the fraudulent transaction, the plaintiffs must allege and prove diligence in making inquiry, and that they have instituted their cause of action within four years of the time the fraud was actually discovered. *Westervelt v. Filter* (Neb.), 89 N. W. Rep. 994.

Sec 725. Ohio.

(See Vol. V, § 873; Vol. VII, § 778, Vol. VIII, § 795.) The bar to an action of ejectment by a mortgagee after condition broken is 21 years, as provided by Rev. Stat., § 4977. *Bradfield v. Hale*, 67 O. St. 316 (65 N. E. Rep. 1008). In § 4982, Rev. Stat. 1892, which limits to four years actions for relief on the ground of fraud, the saving clause, "but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud," embraces actions to set aside deeds which are constructively fraudulent as to creditors of the grantor. The clause does not contemplate a constructive discovery, and the cause of action does not accrue when the fraudulent deed is filed for record, unless the plaintiff then receives actual notice of its execution, and of the circumstances which render it fraudulent. *Stivens v. Summers*, 68 O. St. 421 (67 N. E. Rep. 884).

Sec. 726. Texas.

(See Vol. V, § 881; Vol. VI, § 882; Vol. VIII, § 798; Vol. IX, § 770.) Where an owner of real estate which has been sold on execution brings an action to recover it from the purchaser's sole devisee in which he tenders the amount due, basing his right on an alleged agreement with the purchaser that the price paid was to be considered as a loan for which the sheriff's deed was security, the action is "an action for

the recovery of real estate," and is not governed by Rev. Stat. 1895, Art. 3358, providing that every action "other than for the recovery of real estate" shall be commenced within four years after the accruing of the right. *Stafford v. Stafford*, 96 Tex. 106 (70 S. W. Rep. 75).

SURFACE WATER.

EPITOME OF CASES.

Sec. 727. Right to interrupt or increase flow of surface water. The common law right of a land owner to resist the flow of surface water from adjoining land will not be upheld to the extent of permitting him to inflict an unreasonable injury upon the adjoining owner. *City of Franklin v. Durgee*, 71 N. H. 186 (51 Atl. Rep. 911; 58 L. R. A. 112). In New Jersey it is held that the diversion or altered transmission of surface water, caused by the erection of a building upon land over which it is accustomed to flow, affords no ground of action to a person who suffers injury by reason thereof. *Jessup v. Bamford Bros. Silk Mfg. Co.*, 66 N. J. L. 641 (51 Atl. Rep. 147; 58 L. R. A. 329; 88 Am. St. Rep. 502). In California the upper owner has an easement over lower adjacent land for the discharge of surface water naturally accustomed to flow thereon from his land, and the lower owner has no right to interrupt such natural flow; but this rule does not apply to waters accumulating on the upper lands from the overflow of a watercourse. *Sanguinetti v. Pock*, 136 Cal. 466 (69 Pac. Rep. 98; 89 Am. St. Rep. 169). A proprietor of land who collects surface water thereon by the construction of ditches and drains, which is discharged on lower lands to their injury, cannot escape liability on the ground that the drains were no larger than was reasonable or proper in the interest of good husbandry. *Breen v. Hyde*, 130 Mich. 1 (89 N. W. Rep. 732). Where one damaged by an overflow of surface water, resulting from the failure of an adjoining owner to perform his contract to keep open a ditch, could have avoided the damage, by his cleaning out the ditch, he is only entitled to recover the reasonable cost of opening the ditch and keeping it open. *Raleigh*

v. Clark, Ky. (71 S. W. Rep. 857; 24 Ky. Law Rep. 1554).

Sec. 728. Collection of surface water in natural depression on land—Right of land owner to divert by ditches. Where surface water has collected in a natural depression on one's land he cannot, by the construction of artificial ditches, either directly or indirectly, cast it upon adjoining lands to their injury. *Brandenberg v. Zeigler*, 62 S. C. 18 (39 S. E. Rep. 790; 55 L. R. A. 414; 89 Am. St. Rep. 887); *Noyes v. Cosselman*, 29 Wash. 635 (70 Pac. Rep. 61; 92 Am. St. Rep. 937); *Sullivan v. Johnson*, 30 Wash. 72 (70 Pac. Rep. 246); *Rice v. Norfolk & C. R. Co.*, 130 N. C. 375 (41 S. E. Rep. 1031). The first two cases exhaustively discuss this subject, and in the second the court say: "The rule that an owner of land has no right to rid his land of surface water by collecting it in artificial channels, and discharging it upon the land of an adjoining proprietor, to his injury, is followed alike in the states which have adopted the common law as well as those which have adopted the rule of the civil law. 24 Am. & Eng. Enc. Law, p. 931; Gould Waters, p. 545, § 271; Ang. Water Courses, (7th Ed.) p. 133, § 108j; Washb. Easem. p. *353; *Barkley v. Wilcox*, 86 N. Y. 140 (40 Am. Rep. 519); *Templeton v. Voshloe*, 72 Ind. 134 (37 Am. Rep. 150); *Schuster v. Albrecht*, 98 Wis. 241 (73 N. W. Rep. 990; 67 Am. St. Rep. 804); *Jackman v. Arlington Mills*, 137 Mass. 277; *Hogenson v. Railway Co.*, 31 Minn. 224 (17 N. W. Rep. 374); *Railroad Co. v. Miller*, 68 Miss. 760 (10 So. Rep. 61); *Brendenberg v. Zeigler*, 62 S. C. 18 (39 S. E. Rep. 790; 55 L. R. A. 414; 89 Am. St. Rep. 887); *Kelly v. Dunning*, 39 N. J. Eq. 482. The foregoing cases are from states adopting the common-law rule; the following are from states adopting the civil law rule: *Anderson v. Henderson*, 124 Ill. 164 (16 N. E. Rep. 232); *Gregory v. Bush*, 64 Mich. 37-42 (31 N. W. Rep. 90; 8 Am. St. Rep. 797); *Butler v. Peck*, 16 O. St. 334 (88 Am. Dec. 452); *Kaufman v. Griesemer*, 26 Pa. 407 (67 Am. Dec. 437); *Paddock v. Somes*, 102 Mo. 226 (14 S. W. Rep. 746; 10 L. R. A. 254); *Town of Cloverdale v. Smith*, 128 Cal. 230 (60 Pac. Rep. 851); *Livingston v. McDonald*, 21 Ia. 160 (89 Am. Dec. 563).

In *Barkley v. Wilcox*, 86 N. Y. 147 (40 Am. Rep. 519), the court says: "The owner of wet and spongy land cannot, if it is true, by drains or other artificial means, collect the sur-

face water into channels, and discharge it upon the land of his neighbor, to his injury. This is alike the rule of the civil and common law. * * * But it does not follow, we think, that the owner of land, which is so situated that the surface waters from the lands above naturally descend upon and pass over it, may not in good faith, and for the purpose of building upon and improving his land, fill or grade it, although thereby the water is prevented from reaching it, and is retained upon the lands above. There is a manifest distinction between casting water upon another's land and preventing the flow of surface water upon your own.'

In *Jackman v. Arlington Mills*, 137 Mass. 283, the court says: 'We take the law to be that the owner of land has no right to collect the surface water into an artificial stream, and discharge it upon the adjoining land of another in such quantities and in such a manner as materially to injure the land, but that such an owner has the right to collect the surface water and the natural drainage of his land into an artificial stream, and discharge it into a natural water course on his own land, if the water course is the natural outlet of the waters thus collected, even although, by this artificial arrangement, the flow of the waters is accelerated, and the volume at times is increased, provided that this is done in the reasonable use of his own land, and that the discharge is not beyond the natural capacity of the water course, and the land of a riparian owner is not thereby overflowed and materially injured. But he has no right to subject the land of another to a servitude of running water to which it is not naturally subject.'

In *Hogenson v. Railway Co.*, 31 Minn. 226 (17 N. W. Rep. 374), it is said: 'The acts of the defendant amount to this: That, being incommoded by the presence of surface waters on its lands, it, by means of ditches, accumulates them and transfers them to the lands of others, where they would not otherwise go, to the damage of the latter lands. Without a grant of the right, it cannot do this. The right of an owner to improve his land for the purpose for which such lands is ordinarily used, and to do it in the ordinary manner, as by building on it, or raising the surface, where necessary to its improvement, even though as an incident to it the rain and snow waters falling on it may be diffused over adjoining land, was conceded arguendo in *O'Brien v. City of St. Paul*, 25 Minn. 331 (33 Am. Rep. 470). Without determining whether that right may not be qualified by the circumstances of particular cases, we are pre-

pared to say that that is as far as it is safe to go, and that it does not include the right to gather the surface waters on one's land and turn them upon the land of another, to its damage, even though the former land may as a consequence thereof be improved. In other words, he may not in this way improve his own land by merely transferring to the land of another a burden which nature has imposed on his land."

In *Brandenberg v. Zeigler*, 62 S. C. 18 (39 S. E. Rep. 790; 55 L. R. A. 414; 89 Am. St. Rep. 887), it is said: "When one having the right to cut off surface water from his land nevertheless permits such water to collect in a natural basin on his land, he has an absolute right of property in such water, and may use it exclusively as his own. His dominion over such water is as great as his dominion over the realty upon which it rests and of which it is a part. He can no more cast such water, by artificial means, injuriously upon his neighbor, than he could cast the mud or soil upon his neighbor's premises. In either case he would violate the neighbor's right of dominion over his own property. The absolute right of the lower proprietor to embank against the flow of surface water, and thereby cause it to rest upon the upper proprietor's land, is wholly irreconcilable with the claimed right of the upper proprietor by artificial means to collect and cast such water upon the lower proprietor.'"

A railroad company may, like any other proprietor, protect itself from the flow of ordinary surface water, and will not be liable to an adjoining owner for so doing. Where, however, a large territory is drained by a ravine or draw, through which the surface water of such territory flows in times of flood or melting snows in such quantities as to cut a channel, a railway company should, in constructing its roadbed across such a draw, provide for the discharge of such water as naturally flows therein; and if its roadbed is so constructed as to dam the water and flow it back over the premises of an adjoining proprietor, or to discharge the accumulated water in unusual quantities upon the lands of those adjoining, it will be liable for the damages occasioned thereby. *Chicago, R. I. & P. R. Co. v. Shaw*, 63 Neb. 380 (88 N. W. Rep. 508; 56 L. R. A. 341). To the same effect is the case of *Missouri Pac. Ry. Co. v. Hemingway*, 63 Neb. 610 (88 N. W. Rep. 673).

Sec. 729. Diversion of surface water by railroad.
The common law rule as to surface water prevails in South

Carolina, and no action lies against a railroad company for interfering with the flow of surface water by the construction of an embankment on its right of way. *Lawton v. South Bound Ry. Co.*, 61 S. C. 548 (39 S. E. Rep. 752). But it is actionable injury for a railroad company to collect surface water in this manner and discharge it upon the lower owner in a concentrated flow. *Cain v. South Bound Ry. Co.*, 62 S. C. 25 (39 S. E. Rep. 792). A railroad company has no greater rights as to surface water than an individual landowner, and it is liable for damages caused to crops on adjacent lands by its casting thereon in unnatural quantities surface water collected by it through ditches dug alongside its track embankment. *Chorman v. Queen Anne's Ry. Co.*, Del. (54 Atl. Rep. 687). See opinion for collation of authorities on right to collect surface waters in drains. A railroad company which, by the construction of its track through a basin of surface water having no natural outlet, thereby causes the same to flow out upon the lands of others to their injury, is liable for the damages thus occasioned. *Rice v. Norfolk & C. Ry. Co.*, 130 N. C. 375 (41 S. E. Rep. 1031). The failure of a railroad company to provide, at the time of the construction of a sidetrack, a ditch to carry off an overflow of surface water which could not have been reasonably foreseen, does not render it liable to an action for injuries resulting from the original failure to construct the ditch. *Priest v. Boston & M. R. R.*, 71 N. H. 114 (51 Atl. Rep. 667). Ohio Rev. Stat., § 3342, requiring railroad companies to construct and keep open ditches of sufficient depth, width, and grade to conduct into some proper outlet the water which accumulates along the sides of such roadbed from the construction or operation of such road, is a valid statute in so far as the accumulation of water is injurious to the contiguous lands or detrimental to the public, but invalid where such water is not injurious to such lands or the public. See opinion as to constitutionality of other sections of this statute. *Chicago & E. R. Co. v. Keith*, 67 O. St. 279 (65 N. E. Rep. 1020; 60 L. R. A. 525). An action by a landowner for damages resulting from the negligent construction of a roadbed or embankment by a railroad company does not accrue until such landowner sustains actual injury. *Missouri Pac. Ry. Co. v. Hemingway*, 63 Neb. 610 (88 N. W. Rep. 673).

Sec. 730. Liability of municipalities. A township is liable at common law for gathering from its streets, and turn-

ing out of its course, surface water in such quantities that the gutters are inadequate to carry it, so that it overflows and injures private property in the vicinity. *McAskill v. Hancock Tp.*, 129 Mich. 74 (88 N. W. Rep. 78; 55 L. R. A. 738). A general grant of power to grade streets, and to establish in connection therewith a system of drainage, does not carry with it any right on the part of the municipality to create and maintain a nuisance by causing surface water polluted by filth and laden with noxious odors to be discharged upon the premises of a private citizen; and he may, when such a thing has been done, maintain against the city an action to recover the damage he has in consequence sustained. *Holmes v. City of Atlanta*, 113 Ga. 961 (39 S. E. Rep. 458). A city may construct a drain for the purpose of carrying off surface water, but it is liable for damages caused to private property resulting from its failure to provide an outlet for such drain. *City of Valparaiso v. Keyes*, 30 Ind. App. 447 (66 N. E. Rep. 175). A city constructing a drain leading to an already insufficient culvert constructed by a railroad company under its embankment erected in a street, under permission given by a municipal ordinance, is jointly liable with the railroad company for an overflow of lands resulting from the accumulation of water on account of the insufficiency of the culvert. *Kelly v. Pittsburg, G. C. & St. L. Ry. Co.*, 28 Ind. App. 457 (63 N. E. Rep. 233; 91 Am. St. Rep. 134). In Rhode Island it is held that a municipal corporation is not liable for the damages sustained by an abutting owner by reason of the escape of the natural flow of surface water from a highway onto the land because of the filling in of the highway. *O'Donnell v. White*, 24 R. I. 483 (53 Atl. Rep. 633). A town which has authorized a street railway company to construct its road in a street does not thereby become liable to a property owner for damages resulting from the diversion of surface water, through the obstruction of a gutter, by the construction of such road. *Hewett v. Inhabitants of Canton*, 182 Mass. 220 (65 N. E. Rep. 42).

Sec. 731. Individual liability of municipal officers.

In Michigan it is held that road officers may be held individually liable for injury to land resulting from their so constructing culverts and drains in a highway as to cause the unusual and unnatural collection and discharge of water thereon. *Breen v. Hyde*, 130 Mich. 1 (89 N. W. Rep. 732). Referring to a particular instruction given by the judge below, the court

say: "This statement of the law is not in harmony with *Cubit v. O'Dett*, 51 Mich. 347 (16 N. W. Rep. 679), where it was said: 'Highway authorities have no more right than private persons to cut drains, the necessary result of which will be to flood the lands of individuals. This was shown in *Ashley v. City of Port Huron*, 35 Mich. 296 (24 Am. Rep. 552); *Van Pelt v. City of Davenport*, 42 Ia. 308 (20 Am. Rep. 622), where many authorities are referred to. The highway overseer, no doubt, has a discretion in deciding how and where he will expend highway labor; but it is a discretion limited by the rights of individuals, and when he invades those rights he becomes liable. *Tearney v. Smith*, 86 Ill. 391. And when he is liable for a lawless act, all his assistants are liable with him for the consequent injury. Story, Ag. §§ 311, 312; *Brown v. Howard*, 14 Johns, 119; *Coventry v. Barton*, 17 Johns, 142 (8 Am. Dec. 376); *Fiedler v. Maxwell*, 2 Blatchf. 552 (Fed. Cas. No. 4,760); *Tracey v. Swartwout*, 10 Pet. 80 (9 L. Ed. 354); *Smith v. Colby*, 67 Me. 169. This rule sometimes, when the agent has acted in good faith and without knowledge of the want of legal authority, may seem to operate oppressively; but it is a necessary and very just rule, notwithstanding, and full protection of the citizen in his legal rights would be impossible without it. Absence of bad faith can never excuse a trespass, though the existence of bad faith may sometimes aggravate it. Every one must be sure of his legal right when he invades the possession of another'."

TAXES AND TAX TITLES.

EPITOME OF CASES.

Sec. 732. Taxes—Nature of obligation to pay. In Nebraska it is held that a real estate tax is not a personal obligation of the landowner; that his personal property is not liable for its payment, and a deficiency judgment entered against him in a suit to foreclose the tax lien therefor is void. *Kelly v. Wehn*, 63 Neb. 410 (88 N. W. Rep. 682). Taxes levied on real estate for general revenue purposes, or by way of special

assessments for benefits received on account of local improvements, is not a debt, in the ordinary meaning of the word, against the owner of the property, to be enforced as a personal liability, but a charge upon the real estate against which assessed, to be enforced and collected by a sale of the property liable for the taxes so levied and assessed. *Philadelphia Mortg. & T. Co. v. City of Omaha*, 63 Neb. 280 (88 N. W. Rep. 523; 57 L. R. A. 150; 93 Am. St. Rep. 442).

Sec. 733. Collateral inheritance tax—Constitutionality of statutes. New York Laws 1899, ch. 76, amending Laws 1896, ch. 908, § 230, so as to subject to a transfer tax "all estates upon remainder or reversion, which vested prior to June thirtieth, 1885, but which will not come into actual possession or enjoyment of the person or corporation beneficially interested therein until after the passage of this act," is held unconstitutional, as diminishing the value of vested estates. *In re Pell's Estate*, 171 N. Y. 48 (63 N. E. Rep. 789; 57 L. R. A. 540; 89 Am. St. Rep. 791). In Wisconsin it is held that when a statute (Laws 1899, ch. 355) imposing inheritance taxes undertakes to exempt therefrom all estates whose value is less than ten thousand dollars, the beneficiaries being of the same class, and the tax being levied without regard to the amount received by the individual beneficiary, the classification is arbitrary, and the statute therefore unconstitutional. *Black v. State*, 113 Wis., 205 (89 N. W. Rep. 522; 90 Am. St. Rep. 853). An inheritance tax statute (Minn. Laws 1901, ch. 255), which imposes a tax on transfers of property to collateral descendants, on the full value thereof when such value exceeds five thousand dollars, but only on the excess over and above five thousand dollars, in case of transfers to lineal descendants, is held unconstitutional. *State v. Bazille*, 87 Minn. 500 (92 N. W. Rep. 415; 94 Am. St. Rep. 718). The court follows and approves the case of *Drew v. Tift*, 79 Minn. 175 (81 N. W. Rep. 839; 47 L. R. A. 525; 79 Am. St. Rep. 446), and says: "It was there held that section 1, art. 9, of our constitution, being a provision requiring equality of taxation, applies to inheritance taxes, exactly as it does to taxes on other property, except as therein otherwise expressly provided, and that statutes providing for such taxes, to be valid, must include all inheritances, devises, bequests, and legacies, of every kind and description, including those of both real and personal property, and, further, that they must be uniform, and apply equally to all persons or corpora-

tions, whether collateral or lineal descendants. The decision covers the law in other respects, but the features just mentioned are alone pertinent to the questions present in the case at bar. If the act does not operate uniformly and equally as to all persons or corporations, or if it applies solely to personal property, it can not be sustained." But in Washington, in a decision upholding the constitutionality of an inheritance tax statute (Laws 1901, p. 68), which exempts ten thousand dollars where the estate passes to direct heirs, but not where it passes to collateral heirs or strangers to the blood, and which imposes a greater per cent. of tax on cases of the latter kind than the former, it is held that the constitutional requirements of uniformity and equality in taxation do not apply to inheritance taxes. *State v. Clark*, 30 Wash. 439 (71 Pac. Rep. 20). The court say: "That the right to control the disposition of property after death and to devise it by will is conventional has been the settled view of the highest judicial authorities in perhaps all civilized countries. The supreme court of the United States, in *Magouin v. Bank*, 170 U. S. 283 (18 Sup. St. Rep. 594; 42 L. Ed. 1037), upon a full statement of the history and authority of such taxes, said: 'It is not necessary to review these cases, or state at length the reasoning by which they are supported. They are based on two principles: (1) An inheritance tax is not one on property, but one on the succession. (2) The right to take property by devise or descent is the creature of the law, and not a natural right,—a privilege; and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation.' Inheritance tax laws have been in force in the state of Pennsylvania for 65 years or more, and in a number of other states for a considerable time. The main features in all these statutes are substantially the same, and their constitutional validity has been affirmed in every court in which they have been challenged, both state and federal, except in instances which arose where their validity was assailed on the ground of constitutional restrictions, as in the Wisconsin and New Hampshire cases heretofore mentioned. The objection urged here, that the statute is in conflict with sections 1, 2, and 5 of article 7 of the state constitution, relating to taxation, is not

tenable, because the charge made upon the passing of the estate is not a tax on property. It is an impost or excise on the right to pass the estate and the privilege of the devisee to take. That it is not within the provision relating to the tax on property is well settled by practically unanimous authority. In the following authorities will be found clear discussions and conclusive adjudications of both the legislative competency to enact such laws and the definition of the nature of the charge levied on the right to pass the estate: *United States v. Perkins*, 163 U. S. 625 (16 Sup. Ct. Rep. 1073; 41 L. Ed. 287); *Strode v. Com.*, 52 Pa. 181; *Eyre v. Jacob*, 14 Grat. 422 (73 Am. Dec. 367); *Schoolfield's Ex'r v. City of Lynchburg*, 78 Va. 366; *State v. Dalrymple*, 70 Md. 293 (17 Atl. Rep. 82; 3 L. R. A. 372); *Clapp v. Mason*, 94 U. S. 589 (24 L. Ed. 212); *In re Merriam's Estate*, 141 N. Y. 479 (36 N. E. Rep. 505); *State v. Hamlin*, 86 Me. 495 (30 Atl. Rep. 76; 25 L. R. A. 632; 41 Am. St. Rep. 569); *State v. Alston*, 94 Tenn. 674 (30 S. W. Rep. 750; 28 L. R. A. 178); *Dos. P. Col. Inh. Taxes*, 20; *In re Wilmerding's Estate*, 117 Cal. 281 (49 Pac. Rep. 181); *Minot v. Winthrop*, 162 Mass. 113 (38 N. E. Rep. 512; 26 L. R. A. 259); *Gelsthorpe v. Furnell*, 20 Mont. 299 (51 Pac. Rep. 267; 39 L. R. A. 170); *Scholey v. Rew*, 23 Wall. 331 (23 L. Ed. 99)."

Sec. 734. Collateral inheritance tax—Construction of statutes. Ill. Laws 1901, p. 268, construed and applied—inheritance tax—exemption of legacy to charitable institution. *Provident Hospital & Training School Ass'n v. People*, 198 Ill. 495 (64 N. E. Rep. 1031). The real estate of one dying after the passage of Ia. Laws 26th Gen. Assem., ch. 28, requiring the payment of an inheritance tax, but before the unconstitutionality of such statute was cured by Laws 27th Gen. Assem., ch. 37, is not subject to such tax. *Herriott v. Potter*, 115 Ia. 648 (89 N. W. Rep. 91). Construing and applying Ia. Code, §§ 1467, 1470, 1471, it is held that when the estate of a decedent exceeds \$1,000, all property passing to collateral heirs or strangers to the blood is subject to the collateral inheritance tax of five per cent. *Gilbertson v. McAuley*, 117 Ia. 522 (91 N. W. Rep. 788). Mich. Laws 1899, Act No. 188, § 2 construed and applied—inheritance tax—adoption of statute of New York. *Stellwagen v. Durfee*, 130 Mich. 166 (89 N. W. Rep. 728). N. Y. Laws 1893, ch. 701; Laws 1896, ch. 908; Laws 1900, ch. 382, construed and applied—exemption from transfer tax of property devised to trustees to hold for a time

and then to devote to a designated charity. In *re Graves' Estate*, 171 N. Y. 40 (63 N. E. Rep. 787). For further construction of these statutes, see *In re Watson's Estate*, 171 N. Y. 256 (63 N. E. Rep. 1109); *In re Corbett's Estate*, 171 N. Y. 516 (64 N. E. Rep. 209). N. Y. Laws 1896, ch. 908, § 230; Laws 1897, ch. 284; Laws 1899, ch. 76, construed and applied—transfer tax on estates in remainder—appraisement. In *re Vanderbilt's Estate*, 172 N. Y. 69 (64 N. E. Rep. 782); *In re Brez's Estate*, 172 N. Y. 609 (64 N. E. Rep. 958). For construction of the collateral inheritance tax statutes of Tennessee, see *Harrison v. Johnson*, 109 Tenn. 245 (70 S. W. Rep. 414); *Shelton v. Campbell*, 109 Tenn. 690 (72 S. W. Rep. 112).

Sec. 735. Exemption from taxation—General principles—Statutes construed. Statutes exempting property from taxation are to be strictly construed against the exemption and in favor of the state and taxation. In *re Walker*, 200 Ill. 566 (66 N. E. Rep. 144). The exemption of its property from taxation given a corporation by a provision in its charter at a time when there was no constitutional provision authorizing the alteration of such charters, can not be taken away by subsequent statutes or constitutional amendment. *State v. Alabama Bible Soc.*, 134 Ala. 632 (32 So. Rep. 1011). 5 U. S. Stat., ch. 76 construed and applied—exemption of military bounty land. *Long v. Olson*, 115 Ia. 388 (88 N. W. Rep. 933). For a discussion of the power of the state to annul an exemption from taxation contained in a charter of a private corporation, see *Cooper Hospital v. City of Camden*, 68 N. J. L. 691 (54 Atl. Rep. 419). Under the constitution in force in Kentucky in 1888, a city having power to contract with a water company for water for fire and domestic purposes can not grant an exemption of the company's property from taxation as a part of the consideration for such contract. *City of Dayton v. Bellevue Water & Fuel Gaslight Co.*, Ky. (68 S. W. Rep. 142; 24 Ky. Law Rep. 194).

Sec. 736. Exemption from taxation—Public lands and public property. Construing and applying Ohio Const., art. 12, § 2, and Rev. Stat., §§ 2566, 2731, 2732, it is held that the ownership of lands by a municipal corporation does not bring them within any statutory exemption from taxation, unless they are used in the exercise of a municipal function; and

this is true although they are leased by the municipality, and the money realized is applied to a public purpose. *City of Cincinnati v. Lewis*, 66 O. St. 49 (63 N. E. Rep. 588). Public property, within the meaning of that clause of the constitution of Georgia which authorizes the general assembly to exempt from taxation "all public property," embraces only such property as is owned by the state, or some political division thereof, and the title to which is vested directly in the state, or one of its subordinate political divisions, or in some person holding exclusively for the benefit of the state, or a subordinate public corporation. Applying this principle, *Laws 1884-85*, p. 84, § 15 (Pol. Code, § 1156), exempting from taxation armories owned by military companies is held unconstitutional. *Board of Trustees of Gate City Guard v. City of Atlanta*, 113 Ga. 883 (39 S. E. Rep. 394; 54 L. R. A. 806).

Sec. 737. Exemption from taxation—Property of educational institutions. Property of a seminary, though not directly and actually used in the school itself, but from which it derives an income necessary to maintain the institution in the best manner, is exempt, under a statute (*Colo. Laws 1864*, p. 209) exempting from taxation "such property as may be necessary for carrying out the design of the seminary in the best manner, while used exclusively for such purpose." *Colorado Seminary v. Board of Com'rs*, 30 Colo. 507 (71 Pac. Rep. 410). A house belonging to a college society, the dominant use of which is as a dormitory for the members of the society, is not exempt from taxation, under *Mass. Pub. Stat.*, ch. 11, § 5, cl. 3, although some literary or scientific work is done in the building. *Phi Beta Epsilon Corp. v. City of Boston*, 182 Mass. 457 (65 N. E. Rep. 824). Land and a building thereon used in part for a chapel for religious worship, and in part for the residence of teachers in a free parochial school located on an adjoining lot is not exempt from taxation, under *R. I. Gen. Laws*, ch. 44, § 2. *In re City of Pawtucket*, 24 R. I. 86 (52 Atl. Rep. 679). By the enactment of *Va. Code*, § 457, as amended by *Laws 1895-96*, p. 218, it was the intention of the legislature to exempt real estate from taxation where it, or the proceeds arising from it, are devoted exclusively to charitable or educational purposes, and, where only a part of the real estate or its proceeds is used for such purposes, to exempt the real estate to the extent that it or its proceeds are used for such

purposes. *City of Staunton v. Mary Baldwin Seminary*, 99 Va. 653 (39 S. E. Rep. 596).

Sec. 738. Exemption from taxation—Property “used solely and exclusively” for schools. Lots and a building donated for a theological school on conditions that the bishop of the diocese should be the chief instructor in the school, and should live in the building, with his family, are held to be exempt from taxation, under Colo. Const., art. 10, § 5; and Mills’ Ann. Colo. Stat., § 3766, exempting “lots with the buildings thereon, if said buildings are used solely and exclusively * * * for schools;” though the whole of the building is occupied by the bishop and his family and the students reside elsewhere. *Bishop, etc., of the Cathedral of St. John the Evangelist v. Treasurer of Arapahoe County*, 29 Colo. 143 (68 Pac. Rep. 272). The court say: “The words ‘solely’ and ‘exclusively,’ employed in the provisions of the law under consideration, are words of limitation, which in their ordinary sense strictly limit the subjects to which they refer; but their purport and meaning in this instance must be ascertained from the intent of the people and the legislature in exempting from taxation property used for educational purposes. In providing for these exemptions the object was to foster educational institutions by relieving their property, within prescribed limits, from the burdens of taxation. This being the end to be attained, the meaning of the law must be ascertained by a construction within its spirit, purpose, and policy, not opposed to its letter. In brief, a construction consonant with the spirit which prompted the adoption of the provisions in question, and which will give them full effect. If the use of property utilized for a school is limited to that which is indispensable for this purpose, the extent to which institutions of this character are benefitted by taxation is confined to the narrowest possible limits, and every use which could be dispensed with, and yet permit a school to be conducted which might be so termed in name, would subject the property so used to taxation. Such a construction would be too narrow, and fall far short of expressing the intent of the people and legislature with respect to schools. The fundamental object of the law was to exempt property used for school purposes from taxation. To carry out this design, the uses permissible must necessarily embrace all which are proper and appropriate to effect the objects of the institution claiming the benefits of the exemp-

tion. *State v. Ross*, 24 N. J. L. 497; *Northampton Co. v. Lafayette College*, 128 Pa. 132 (18 Atl. Rep. 516); *St. Mary's Church v. Tripp*, 14 R. I. 307; *Trustees of Griswold College v. State*, 46 Ia. 275 (26 Am. Rep. 138); *Masachusetts General Hospital v. Inhabitants of Somerville*, 101 Mass. 319; *President, etc., of Harvard College v. Assessors of Cambridge*, 175 Mass. 145 (55 N. E. Rep. 844; 48 L. R. A. 547). So that a use incident to the main purpose for which the property is held is not one which falls within the prohibitions contemplated by the law. Tested by these considerations, the occupation of the premises by the bishop and his family does not render the property subject to taxation. He is there as an instructor. A school can not be conducted without teachers, and the mere fact that the bishop resides on the premises with his family is but an incident to the main purpose which requires his presence."

Sec. 739. Exemption from taxation—Property of charitable institutions. A statute (Ky. Stat., § 4026) exempting from taxation "places of burial, not held for private or corporate profit, [and] institutions of purely public charity," does not exempt funds of a cemetery company derived from the sale of lots. *Commonwealth v. Lexington Cemetery Co.*, Ky. (70 S. W. Rep. 280; 24 Ky. Law Rep. 924). A constitutional provision (S. Dak. Const., art. 11, § 6) authorizing the exemption of property "used exclusively" for charitable purposes, does not exempt a building owned by a charitable institution, a part of which is rented for a store, although the rents are used for charitable purposes. *State v. Board of Equalization*, S. Dak. (92 N. W. Rep. 16). See opinion for discussion of this subject. N. J. Gen. Tax Law, § 200, exempting from taxation "all buildings used exclusively for charitable purposes, with the lands whereon the same are erected and which may be necessary for the fair enjoyment thereof," exempts buildings, exclusively for charitable purposes, of a foreign corporation, the primary objects of which are "to establish missions and establish a missionary priesthood, to conduct ecclesiastical seminaries for the education of young men for the Catholic priesthood, and to conduct colleges and other educational institutes wherein its membership is educated for said priesthood;" but only so much of the land is exempt as is necessary to the fair enjoyment of the exempt buildings. *State v. Brakeley*, 67 N. J. L. 176 (50 Atl. Rep.

589). The exemption under this statute is confined to buildings and land in and upon which the charitable work is actually conducted. *Cooper Hospital v. City of Camden*, 68 N. J. L. 691 (54 Atl. Rep. 419); *State v. Fisher*, 68 N. J. L. 143 (52 Atl. Rep. 228).

Sec. 740. Exemption from taxation—Property of charitable institutions—Property owned by an individual and devoted to work of a charitable institution. The property of a charitable institution which comes within the purview of a statute (Burns' Ind. Rev. Stat., § 8412) exempting the property of such from taxation, is exempt from taxation although it belongs to an individual and is maintained as a private enterprise by contributions from counties and private donations. *Vink v. Work*, 158 Ind. 638 (64 N. E. Rep. 83). The court say: "It will be observed that the act applies to individuals as well as to private and public corporations, and that the only conditions are that the property shall be used and set apart for educational or charitable purposes. It was held in *City of Indianapolis v. Sturdevant*, 24 Ind. 391, 394, that the fact that the institution was conducted on private account, and the earnings applied to the personal benefit of the individual proprietor, did not deprive property erected for the use of any literary or scientific institution of the benefit of the exemption secured to such property by the statute. The reasoning in the earlier cases of *Orr v. Baker*, 4 Ind. 86, and *Common Council v. McLean*, 8 Ind. 328, was declared inapplicable to the facts shown by the complaint in the *Sturdevant Case*, supra, or, if supposed to be pertinent, it was disapproved. In *Insurance Co. v. Kent*, 151 Ind. 349, 355 (50 N. E. Rep. 562; 51 N. E. Rep. 723), the *Sturdevant Case* is distinguished and approved. See, also, *Society v. Boston*, 142 Mass. 24 (6 N. E. Rep. 840); *Appeal Tax Ct. of Baltimore City v. Baltimore Academy of The Visitation*, 50 Md. 442; *Bartlet v. King*, 12 Mass. 537 (7 Am. Dec. 99); *Goning v. Emery*, 16 Pick. 107 (26 Am. Dec. 645); *Association for Benefit of Colored Orphans v. Mayor, etc., of City of New York*, 104 N. Y. 581 (12 N. E. Rep. 279); *Western Dispensary of City of New York v. City of New York*, (Sup.) 4 N. Y. Supp. 547; *New York Infant Asylum v. Board of Sup'rs of Westchester Co.*, 31 Hun, 116."

- **Sec. 741. Exemption from taxation—Property of charitable institutions—Proposed future location.** Construing

and applying a statute (N. J. Laws 1894, p. 354; 3 Gen. Stat., p. 3320) exempting from taxation "all buildings used exclusively for charitable purposes, with the land whereon the same are erected and which may be necessary for the fair enjoyment thereof and the furniture and personal property used therein." It was held that a charitable institution already enjoying under the statute exemption from taxation for its house and the land on which it was located, could not claim as exempt other lands to which it proposes to remove its institution at some future time, on account of its erection thereon of a camp consisting of tents and one frame structure adjacent thereto, used exclusively as a kitchen and laundry for the camp, in which no one slept, used during certain seasons of the year to accommodate an overflow from the main building. *State v. Atlantic City*, 68 N. J. L. 385 (53 Atl. Rep. 399; 59 L. R. A. 947). The court say: "In considering the question here raised, we might ask, what is a building, in the sense of the statute? According to Webster, a building is defined as 'that which is built; a fabric or edifice constructed, as a house, a church, etc.' This definition was adopted in construing the word as used in the mechanic's lien law in *Coddington v. Bock Co.*, 31 N. J. L. 477. It needs no argument to conclude that a tent is not a building. Is the frame tenement used for a kitchen and laundry only, without any accommodations for sleeping or for the care and shelter of the objects of the charity, a building, in the sense of the statute? It is, perhaps, within the ordinary definition of 'building,' taken in its broadest sense; but is it within the statutory meaning? The word 'building,' in a statute, will almost always depend for its meaning, in some degree, upon the particular subject-matter, and its connection with other words. *Bish. St. Crimes*, 292. The use of the word in the statute under consideration is clearly within the rule here suggested; for it is here associated with other objects of a charitable character that are to enjoy a like immunity, and the maxim, '*Noscitur a Sociis*,' would apply. And the statutory definition is not merely buildings, but buildings used exclusively for charitable purposes, with the land whereon the same are erected, and which may be necessary to the fair enjoyment thereof. The associated words, where, as in this clause, buildings are the principle subject-matter of the exemption, are colleges, schoolhouses, buildings erected and used for religious worship, and buildings used as asylums or schools for the care, cure, maintenance, and education of feeble-minded persons

and children. This circumstance indicates that the buildings here intended were to be such as would comfortably house the class of persons to be benefitted by the charity, and the officers and agents who were to administer the same. The fact that the exemption is extended to 'the furniture and personal property used therein' is a like indication. The qualifying words, 'used exclusively for charitable purposes,' further point to the building as a place where the charitable use was to have a concrete existence. Again, the words 'and the land,' etc., 'necessary to the fair enjoyment' of the buildings, show that the building was to be the principle factor in the scheme, and not a mere incident to the purposes of an encampment or some other temporary device.

The conclusion we have reached from these observations, and the other circumstances developed by the testimony, is that the structure for kitchen and laundry purposes, before referred to, is not a building, in the sense of the statute under consideration. To determine otherwise might have the effect of encouraging evasions of this wholesome law, and the consequent exemption unlawfully of large aggregations of property from the common burden of taxation. The result thus reached is also in harmony with the general purposes of the corporation, which are declared in the charter to be 'to provide at Atlantic City a house, and medical treatment during the summer season for invalid children and those needing the benefit of sea air.' In reaching the conclusion, we are not unmindful of the principle that statutes in aid of such charitable purposes as are here declared are not to be construed narrowly, but liberally. *Sisters of Charity v. Chatham Tp.*, 52 N. J. L. 373 (20 Atl. Rep. 292; 9 L. R. A. 198). And although giving full heed to that beneficent rule of construction, we are unable to find in the statute any support for the claim of exemption under the facts in this case."

Sec. 742. Exemption from taxation—Property of charitable institutions—Church property used for residence of janitor and for Sunday-school purposes. Starr & C. III. Rev. Stat., ch. 120, § 2, subd. 2, exempting from taxation "all church property actually and exclusively used for public worship," is held not to exempt a building belonging to a church congregation situated across an alley from its church, the second floor of which is used for residence purposes by the janitor of the church and the first floor for Sunday-school,

social meetings, and meetings of suborganizations of the church. In *re Walker*, 200 Ill. 566 (66 N. E. Rep. 144). The court say: "Any definition of 'public worship,' to be acceptable, must be sufficiently broad and comprehensive to include within the beneficial operation of the statute of exemptions the church property of all congregations, and every denomination or form of religious faith and worship. The difficulties attending the task of formulating a definition of the term 'public worship,' so that it will be applicable to and comprehend every variety of religious faith and belief, and every religious philosophy of life and death, and omit none, is apparent. The question here in hand is, what is meant by 'public worship,' as applicable to Christ Church of the city of Joliet,—a corporation 'organized for the purpose of public worship according to the rule and observances of the Protestant Episcopal Church of the United States of North America?' This church accepts the doctrine of the inspiration of the Old and New Testaments, and of the divinity of Jesus Christ. Worship in that church is consequently the act of paying honor, religious reverence, homage, and adoration to the God of the Bible. Public worship in that church is therefore the assembling together of the members of that church in a congregation, together with others who may choose to come, for the purpose of worshipping God in accordance with the rules and regulations and religious forms of that organization. 'Public worship,' as applied to Christ Church, means congregational worship of Almighty God. In the United States the word 'congregation' means the members of a particular church who meet in one place to worship. Bouvier's Dict., title 'Congregation.' Every church building which has been constructed for or is to be devoted to the purpose of providing a room or place in which the congregation of the church, and other persons who may desire to attend, may assemble for the purpose of engaging in those devotional exercises which are properly known as 'religious worship,' should, if in no part devoted to secular uses, be regarded as exclusively devoted to public worship, and, together with the land or lot, of sufficient size for the location of the building, be deemed exempt from taxation, though such church building should also contain such adjuncts to the audience rooms or place for assembling of the congregation as room for the safe-keeping of outer coats, wraps, umbrellas, etc., of the persons who are to participate in the religious exercises of worship, or rooms required in order to secure the comfort of

such persons composing such worshipping congregation, or a study room for the use of a pastor in the preparation of his sermons, or rooms for Sunday schools or for sub-organizations of the church, or other purposes wholly nonsecular, and as aids to general religious designs of the congregation, provided the title to the exempted property is in the church organization. A church building which has been erected or provided by the church organization for the purpose or with the view of providing a room or place for public worship does not lose its character as a church building exclusively devoted to 'public worship' by reason of the occasional or even regular additional use of the audience room for other religious purposes of the organization, though such other purposes are not strictly 'public worship,' but only auxiliaries intended to aid in the growth and development of the religious faith and character of the communicants of the church and others, and advance the general welfare and purpose of the organized church. Church buildings which are maintained for the purpose of providing a room or place where audiences or congregations are to assemble for the purpose of engaging in 'public worship,' and which would not be so maintained but for the desire to provide such room or place, are in the true sense maintained exclusively for that purpose, though, as we have before said, the building may also be used for other nonsecular purposes consistent with and in aid of the primary and sole purpose for which the building is maintained. It appears here that the building on said lot No. 2, here sought to be exempted from taxation has no room or place in it for 'public worship,' but that the church building of said Christ Church having the room for the purpose of 'public worship' of the congregation of the church is situated on another lot, to wit, lot No. 3. It further appears from the record of the case as made by the board of review that said lot 2 is separated from lot 3, on which the church building is maintained for 'public worship,' by a public alley 16 feet in width; that the building situated on said lot 2 was erected for and was formerly used as a dwelling, until purchased by the congregation of Christ Church; that the rooms on the second floor are now used and occupied by the janitor of the church,—whether as a residence for the janitor and his family, or rooms in which he may sleep, or in which to store articles used in the care of the church, is not disclosed; that the first floor of the building is used (1) for Sunday-school purposes: (2) 'for social purposes of the congregation;' (3)

for such meetings of the congregation as can not be held in the auditorium, or in the room set apart and consecrated for the religious exercises of the congregation; and (4) for the suborganizations of the church. The meetings of the congregation to be held in this building are 'such as [for some reason not disclosed] can not be held in the auditorium or room [in the church building] set apart and consecrated for the religious exercises of the congregation.' These meetings of the congregation are clearly not for 'public worship,' for, if they were, they could be held in the auditorium or room set apart in the church building for such meetings of the congregation. Such meetings may have been or may be to consider merely business interests of the church or benevolent or charitable undertakings, or matters pertaining to the welfare of the church, or of its pastor or members of the congregation. In the absence of affirmative proof as to the purposes and character of 'meetings' the doubt, if any should or ought arise whether they were for purposes of 'public worship,' must be, as we have seen, solved in favor of the state, and against the exemption of property from taxation. 'Suborganizations of the church or of the congregation' may fairly be entitled to the presumption that they were created and are conducted for the highest and most commendable uses and purposes, yet it can not be assumed the exercises of such suborganizations constitute 'public worship.' In the absence of affirmative proof that such is the case, the assumption, as we have seen, is to the contrary, for the right to enjoy exemption from taxation can only be established by strict proof of the existence of all facts necessary to create the exemption. The exercises at Sunday schools are more nearly akin to those of 'public worship.' The use of the auditorium or other room in a church building proper for the exercises of a Sunday school would be entirely consistent with the view that such church building was exclusively used for the purpose of public worship; but the fact that one or more of the rooms on the first floor of this building on lot No. 2 is or are used as Sunday-school rooms can not give the whole building, and the lot on which it stands, the character of a building used exclusively for 'public worship.'"

Sec. 743. Exemption from taxation—Property of charitable institutions—Church parsonage. A parsonage belonging to a church and set apart for the actual use and occupancy of its parson, does not lose its character as a "parson-

age," so as to lose its exemption from taxation under S. C. Const., art. 10, § 4, merely because the parson, for his personal convenience, leases it to another and applies the rent on another and more convenient residence. *Protestant Episcopal Church v. Prioleau*, 63 S. C. 70 (40 S. E. Rep. 1026; 57 L. R. A. 606). A church parsonage erected upon a church lot and rented to one other than the minister of the church, though the rent be paid to him, is held not to be exempt from taxation, under Ky. Const., § 170, exempting from taxation "places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship," and "all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion." *Broadway Christian Church v. Commonwealth*, Ky. (66 S. W. Rep. 32; 23 Ky. Law Rep. 1695). The court say: "The use of the property, and not the ownership, determines the question of exemption. *Vail v. Beach*, 10 Kan. 214. Business houses erected on the church lot and rented out are not exempt. *Orr v. Baker*, 4 Ind. 86. Parsonages are not exempt, although erected on a portion of the church lot which would otherwise be exempt, and occupied by the minister free of rent, if the language of the exemption only includes places actually used for religious worship, with the grounds attached thereto, and appurtenant to the house of worship. *Methodist Episcopal Church v. Ellis*, 38 Ind. 3; *St. Mark's Church v. City of Brunswick*, 78 Ga. 541 (3 S. E. Rep. 561); *St. Peter's Church v. Scott Co. Com'rs*, 12 Minn. 395 (Gil. 280); *Hennepin Co. v. Grace*, 27 Minn. 503 (8 N. W. Rep. 761); *First Presbyterian Church v. City of New Orleans*, 30 La. Ann. 259 (31 Am. Rep. 225); *State v. Axtell*, 41 N. J. Law 119; *Gerke v. Purcell*, 25 O. St. 248; *Ramsey Co. v. Church of Good Shepherd*, 45 Minn. 229 (47 N. W. Rep. 783; 11 L. R. A. 175); *St. Joseph's Church v. Assessors of Taxes*, 12 R. I. 19 (34 Am. Rep. 597). The authorities on this point seem to be unanimous. The taxation of all property is just. Exemption from taxation must not be enlarged by construction, for the presumption is that the state has exempted, in terms, all the property it intended should escape taxation. *City of Louisville v. Board of Trade*, 90 Ky. 414 (14 S. W. Rep. 408; 9 L. R. A. 629); *Kilgus v. Orphanage of Good Shepherd*, 94 Ky. 444 (22 S. W. Rep. 750; 15 Ky. Law Rep. 318); *Cooley, Tax'n*, 205."

Sec. 744. Exemption from taxation—Property of railroads and manufacturers. The benefits conferred by Ky. Laws 1883-84, p. 195, providing "that all railroads which may be built within this commonwealth * * * shall be exempt from all taxation * * * for a period of five years," are available to the vendee of the building road; but this statute does not authorize an order by a county court to the effect that if a certain proposed railroad be built through the county, "such railroad shall be exempt from the payment of taxes on the same for a term of ten years after said road is completed." *Louisville & N. R. Co. v. Christian County*, (Ky.) 70 S. W. Rep. 180 (24 Ky. Law Rep. 894). La. Const., art. 230 construed and applied—exemption of railroads—construction of term "substantially completed." *Louisiana & N. W. R. Co. v. State Board of Appraisers*, 108 La. 14 (32 So. Rep. 184). For exhaustive consideration of the construction of the constitutional and statutory provisions of Mississippi as to exemption of railroad property, see *Yazoo & M. V. R. Co. v. Adams*, 81 Miss. 90 (32 So. Rep. 937). Pa. Pub. Laws 1893, p. 353 construed and applied—exemption of capital stock of manufacturing companies. *Commonwealth v. Keystone Laundry Co.*, 203 Pa. St. 289 (52 Atl. Rep. 326); *Commonwealth v. American Car & Foundry Co.*, 203 Pa. St. 302 (52 Atl. Rep. 326); *Commonwealth v. American Cement Co.*, 203 Pa. St. 298 (52 Atl. Rep. 330). Tenn. Const., art. 2, § 30, exempting from taxation "articles manufactured of the produce of the state," is held to exempt from taxation a stock of logs upon the yard, in the hands of a mill-operating manufacturer and his property, and lumber, rough and smooth, cut by him from such logs grown on Tennessee soil. *Benedict v. Davidson County*, Tenn. (67 S. W. Rep. 806).

Sec. 745. Taxation of "credits" arising from sale of land. Under a statute (Mich. Comp. Laws, 1897, § 3831, subd. 6) making taxable "all credits, of every kind, belonging to inhabitants of this state," it is held that where one has contracted to sell land and timber to various parties under agreements that he should hold the legal title until payment was made and obligating vendees to pay taxes thereafter, and entitling them to deeds when their agreements were performed, the balances due him under such contracts were taxable as "credits." *City of Marquette v. Michigan Iron & Land Co.*, Mich. (92 N. W. Rep. 934). The court say: "The

vendor has, in effect, exchanged his property for the unconditional obligations of the vendee, the performance of which is secured by the retention of the legal title. The fact that the vendee, in the case of the land contract, may, when making his final payment, demand a conveyance, does not distinguish the obligation from that of a credit secured by a mortgage, as the mortgagor may, when making his final payment, demand a discharge of the mortgage. The obligations under consideration, therefore, resemble, not agreements to pay future rent, or salary to be earned in the future, or promises to buy merchandise and products to be delivered in the future, but credits secured by mortgages. The resemblance between these obligations and credits secured by purchase-money mortgages may best be described by stating that they differ only in this: that the vendor has a remedy, to enforce his rights, which is not given to the mortgagee, namely, he may take immediate possession of his security. Such an inconsequential difference affords no ground for a legal distinction. The decisions of this court which hold all credits secured by mortgages taxable are therefore, in our judgment, decisive of the proposition under discussion. *Attorney General v. Supervisors*, 71 Mich. 16 (38 N. W. Rep. 639); *City of Detroit v. Lewis*, 109 Mich. 155 (66 N. W. Rep. 958; 32 L. R. A. 439). This precise question has been decided by the courts of other states in conformity with these views. *Cooley, Tax'n* (2d Ed.) p. 78; *People v. Trustees*, 48 N. Y. 390; *Ouachita Co. v. Rumph*, 43 Ark. 525; *State v. Rand*, 39 Minn. 502 (40 N. W. Rep. 835); *Perrine v. Jacobs*, 64 Ia. 79 (19 N. W. Rep. 861); *People v. Rhodes*, 15 Ill. 304; *People v. Worthington*, 21 Ill. 171 (74 Am. Dec. 86); *Griffin v. Board*, 184 Ill. 275 (56 N. E. Rep. 397); *Adams v. Clarke*, 80 Miss. 134 (31 So. Sep. 216). Aside from the dissenting opinions in two of the above cases, the only authority referred to by counsel for defendant in support of his position is *Brown v. Thomas*, 37 Kan. 282 (15 Pac. Rep. 211). In that case it was decided that the interest of the vendor, arising out of a contract to sell land, similar to the land contract under consideration in this case, was not taxable. The court reasons as follows: 'The agreement for the sale of the real estate described in the petition confers neither the legal nor the equitable title upon Davidson [the vendee]. It is simply an agreement to sell real estate upon conditions precedent, and sets forth a conditional sale only * * * The legal title has not passed, because no deed or other conveyance has yet been made; and the equitable title has not passed, because the land

has not been paid for, and because, on account of the provisions for forfeiture, it is clearly the intention of the parties, as indicated in the contract, that such title shall not pass until the land is paid for. If we could consider the agreement a mortgage, merely, then, as personal property, it would be taxable. As the agreement can not be construed into a mortgage, nor as creating a debt, but being a conditional sale, only, we must hold that it is not subject to taxation. If it be claimed that the agreement is a "credit," and therefore taxable, the claim is defeated by the definition given to "credit" by the tax law, as follows: "The term 'credit' when used in this act, shall mean and include every demand for money, labor or other valuable thing, whether due or to become due, but not secured by lien on real estate." We do not think the agreement creates a debt, but, if any demand for money is created thereby it is secured on real estate and therefore not a "credit," within the statute.' This reasoning has no application to the case at bar. The contracts under consideration, construed according to the laws of Michigan, as they must be, do not 'set forth a conditional sale only,' but do, as we have already shown, transfer an equitable title to the vendee. Under the laws of Michigan, credits are taxable, though they are secured by a lien on real estate."

Sec. 746. Assessment of taxes—General principles.

The destruction of property after the assessment of taxes against it does not authorize a rebate of the taxes. *Case v. City of Detroit*, 129 Mich. 298 (88 N. W. Rep. 626). Where the day for the convening of the court to make a tax levy is fixed by statute, a levy made by it when convened on a later day is invalid. *Berger v. Lutterlow*, 69 Ark. 576 (68 S. W. Rep. 37). In assessing a street railway located in a highway the valuation should embrace the materials constituting the road and its franchise, but not any interest in the soil. *Mayor, etc. of City of Newark v. State Board of Taxation*, 67 N. J. L. 246 (51 Atl. Rep. 67). The assessment as real estate of one's interest in lands which was in fact personalty will not render void a tax sale thereunder, where such interest was apparently real property. *MacKinnon v. Auditor General*, 130 Mich. 552 (90 N. W. Rep. 329). Where a title to real estate is vested in two persons, who hold in indivision, and in equal proportions, the whole property may be assessed to both owners, without specification as to their respective interests, though it is otherwise when each owns a designated portion of the property, or they own in unequal proportions; and, in the former

case, if the assessment is regular as to one of the co-owners he can have no reason to complain that it is defective as to the other, since such defect can work him no prejudice. *Howcott v. City of New Orleans*, 107 La. 305 (31 So. Rep. 668). Where a large brick building is situated upon several lots owned and used by the same owner, an assessment of the lots separately and of the building as located upon one of them must be paid as levied upon the property as a whole. *Million v. Welts*, 29 Wash. 106 (69 Pac. Rep. 633). A grantee in a conveyance of land by the United States, made on condition that he construct a dry dock of certain pattern and dimensions thereon, and "accord to the United States the right to the use forever of said dry dock, at any time, for the prompt examination and repair of vessels belonging to the United States, free from charge for docking; and if at any time said property hereby conveyed shall be diverted to any other use than that herein named, or if the said dry dock shall be at any time unfit for use for a period of six months, or more, the property hereby conveyed with all its privileges and appurtenances shall revert to, and become the absolute property of the United States," has such a valuable interest in the land as is subject to taxation. *Baltimore Shipbuilding & Dry Dock Co. v. Mayor, etc., of Baltimore*, 97 Md. 97 (54 Atl. Rep. 623).

Sec. 747. Assessment of taxes—Assessment of estate of mining lessee. A lease of a tract of land for the term of forty years "for the purpose of mining garnets thereon, with all the rights pertaining thereto, such as the right to mine for the said garnet or the mineral product contained in said property, with the privilege to cart and carry away such garnet and product from said lot, with right of way to and from," does not create in the lessee any interest in the land which is taxable as real estate under the statutes of Connecticut. *Gen. Stat. 1902, §§ 2299, 2322, 2341. Appeal of Sanford*, 75 Conn. 590 (54 Atl. Rep. 739). The court say: "Instruments which only give a right or privilege of entering upon land for the purpose of mining and removing the minerals therefrom are held to convey no title to or property in the minerals themselves while in the ground, and to create no greater interest in land, even though that interest be real estate, than an incorporeal right to mine, with a title in the minerals after they have been removed by the grantee. *Stockbridge Iron Co. v. Henderson Iron Co.*, 107 Mass. 290; *Smith v. Cooley*, 65 Cal.

46 (2 Pac. Rep. 880); *Kamphouse v. Gaffner*, 73 Ill. 453; *Boone v. Stover*, 66 Mo. 430; *Silsby v. Trotter*, 29 N. J. Eq. 228; *Baker v. Hart*, 123 N. Y. 470 (25 N. E. Rep. 948; 12 L. R. A. 60); *Gillett v. Treganza*, 6 Wis. 343; *Gaston v. Plum*, 14 Conn. 344.

"The weight of authority clearly is that an instrument which purports to convey certain land at a fixed rent, for a term of years, for the purpose of mining, or with the privilege of mining during the term, or which grants merely the right or privilege to mine for a term of years upon described land, conveys no greater estate in the land or the minerals in place than a chattel interest. *Barringer & Adams on Law of Mines & Mining*, p. 51; *Austin v. Huntsville Coal & Mining Co.*, 72 Mo. 535 (37 Am. Rep. 446); *Gnet v. D. & H. Canal Co.*, 136 N. Y. 593 (32 N. E. Rep. 851; 19 L. R. A. 127); *Knights v. Coal Co.*, 47 Ind. 105 (17 Am. Rep. 692); *Massott v. Moses*, 3 S. C. 168 (16 Am. Rep. 697); *Cowan v. Radford Iron Co.*, 83 Va. 547 (3 S. E. Rep. 120); *Duke v. Hague*, 107 Pa. 57; *Brown v. Beecher*, 120 Pa. 590 (15 Atl. Rep. 608); *Ganther v. Atkinson*, 35 Wis. 48; *Denniston v. Haddock*, 200 Pa. 426 (50 Atl. Rep. 197). In the case last cited which was decided in 1901, *Mitchell, J.*, in speaking of some of the earlier Pennsylvania decisions, says that 'the expression that a conveyance of coal in place, even by a lease for a limited term, is a sale, is inaccurate as a general proposition of law, and unfortunate from its tendency to mislead,' and that 'the rules applicable to sales are not to be applied indiscriminately to such instruments, but each is to be construed like any other contract by its own terms.' A collection of cases regarding questions of title to minerals under conveyances of different characters may be found in chapter 2 of *Barringer & Adams*, above cited."

Sec. 748. Assessment of taxes—Assessment of growing timber. Where growing timber belongs to one man and the land to another they should be assessed separately to the owner of each. *Globe Lumber Co. v. Lockett*, 106 La. 414 (30 So. Rep. 902); *Fox v. Pearl River Lumber Co.*, 80 Miss. 1 (31 So. Rep. 583), construing and applying Miss. Code, §§ 3753, 3759, 3774. See, on this subject, *Williams v. Triche*, 107 La. 92 (31 So. Rep. 926). In the case of *Fox v. Pearl River Lumber Co.*, the court say: "In New York it is held that distinct interests may be owned by several persons in the same parcel of land, as one may own the soil and another the build-

ings thereon, and that the buildings are assessable as real estate. *People v. Board of Assessors of City of Brooklyn*, 93 N. Y. 308. In Pennsylvania it is said, where the surface of lands and the minerals thereunder have been severed by conveyance, and the respective interests have become vested in different owners, taxes should be levied upon each owner according to his interest only; and one can not be charged with the whole tax. *Sanderson v. City of Scranton*, 105 Pa. 469. In Massachusetts it is held that a right to maintain a dam upon the land of another is properly assessable as real estate. *Water Co. v. Lynn*, 147 Mass. 31 (16 N. E. Rep. 742)."

Sec. 749. Assessment of taxes—Mortgaged land. A board of review can not impose a penalty upon a mortgagee who declines to disclose to it the name of his assignee, where the mortgage has been sold and transferred in good faith, by raising his assessment to an amount equal to the amount of the said mortgage. *Condit v. Widmayer*, 196 Ill. 623 (63 N. E. Rep. 1078). In Indiana it is held by a divided court that a statute (Laws 1899, p. 422; Burns' Rev. Stat., § 8417a) providing that in the assessment of mortgaged real estate the owner thereof may have the mortgage indebtedness, to an amount not exceeding \$700, and not exceeding half the assessed valuation of the premises, deducted from such valuation, is constitutional. *State v. Smith*, 158 Ind. 543 (63 N. E. Rep. 25; 64 N. E. Rep. 18). See opinion for exhaustive discussion of this subject, also dissenting opinion 158 Ind. 559 (63 N. E. Rep. 214). *Hill's Ann. Or. Laws*, § 2755; *Portland City Charter* (Laws 1882, p. 150), as amended by Laws 1885, p. 408, and Laws 1891, p. 802, construed and applied—assessment of mortgages. *Ross v. City of Portland*, 42 Or. 134 (70 Pac. Rep. 373).

Sec. 750. Assessment of taxes—Statutes construed. Construing and applying Ia. Code, §§ 1305, 1399, it is held that an injunction will not lie to correct the error or wrong of an excessive assessment, but the remedy of the taxpayer is to apply for its correction to the board of equalization; and the fact that no appeal will lie from its decision does not make a tax levied on such an assessment void. *Collins v. City of Keokuk*, 118 Ia. 30 (91 N. W. Rep. 791). Construing together U. S. Rev. Stat., § 5219, and *Hurd's Ill. Rev. Stat.* 1899, p. 1393, § 1; pp. 1399-1401, §§ 30, 35-39, concerning the taxa-

tion of shares of stock in banks and real estate belonging to them, it is held that there is no discrimination against national banks, and that to assess the shares of stock in a national bank at their full fair cash value to the shareholders and then to assess its real estate to the bank at its full fair cash value, is not double taxation, and therefore unconstitutional. *Illinois National Bank v. Kinsella*, 201 Ill. 31 (66 N. E. Rep. 338). Levees connected with a canal are not "improvements," within the meaning of Cal. Pol. Code, § 3617, requiring a separate assessment of "all buildings, structures, fixtures, fences and improvements erected or affixed to the land, except telephone and telegraph lines." *Kern Valley Water Co. v. Kern County*, 137 Cal. 511 (70 Pac. Rep. 476). A statutory provision (Wis. Rev. Stat. 1898, § 1037a) declaring that the property of a waterworks company shall "be deemed personal property for the purposes of taxation," does not render void an assessment of such property as "real estate." *State v. Wharton*, 115 Wis. 457 (91 N. W. Rep. 976). 1 Bal. Ann. Wash. Codes & Stat., §§ 1698, 1699 construed and applied—assessment of mining claims. *Eureka Dist. Gold Min. Co. v. Ferry County*, 28 Wash. 250 (68 Pac. Rep. 727). Cal. Pol. Code, § 3663 construed and applied—assessment of irrigating ditches. *Kern Valley Water Co. v. Kern County*, 137 Cal. 511 (70 Pac. Rep. 476). Cal. Pol. Code, §§ 3764, 3765, 3769 construed and applied—filing and publication of delinquent list. *Davis v. Pacific Improvement Co.*, 137 Cal. 245 (70 Pac. Rep. 15). Mo. Rev. Stat., §§ 7553, 7564, 7683, 7703 construed and applied—assessment of separate tracts or lots. *Yeamans v. Lepp*, 167 Mo. 61 (66 S. W. Rep. 957).

Sec. 751. Assessment of taxes—In whose name assessment should be made. An assessment to "W. et al." of property jointly owned by W. & H. is erroneous. *Asper v. Moon*, 24 Utah, 241 (67 Pac. Rep. 409). Error in an assessment in describing the owner of the property, the C. B. "Railway" Company, as the C. B. "Improvement" Company, can not be made the foundation of a proceeding in equity seeking to have the assessment avoided. *Moffat v. Calvert County Com'rs*, 97 Md. 266 (54 Atl. Rep. 960). Construing and applying Ky. Stat., § 4049, providing that "real estate or any interest therein, shall be listed in the county or district where situated, against the owner of the first freehold estate therein," it is held that the owner of a dower interest in one-third of a

decendent's land is bound for the payment of taxes thereon. *Commonwealth v. Hamilton*, (Ky.) 72 S. W. Rep. 744 (24 Ky. Law Rep. 1944). Under Mass. Stat. 1888, ch. 390, § 56; Rev. Laws, ch. 13, § 56, land is properly assessed in the name of the general owner and holder of the record title, notwithstanding a previous outstanding grant to another of the right to take gravel therefrom for a period of years. *Hunt v. City of Boston*, 183 Mass. 303 (67 N. E. Rep. 244). Construing and applying Hill's Ann. Or. Laws, §§ 2735, 2768, 2776, it is held that it is only where land is unoccupied and the owner unknown that it can be legally assessed otherwise than in the name of the owner; and that an assessment to "owners and claimants known and unknown" is void. *Lewis v. Blackburn*, 42 Or. 114 (69 Pac. Rep. 1024). The court say: "If the name of the owner was known to the assessor, as the assessment itself would seem to indicate, the land should have been assessed to him. If, on the other hand, it was unoccupied, and the owner unknown, it should have been so assessed. But an assessment can not legally be made in the alternative, either to owners known or unknown. It must be made definitely to one or the other, and, unless so made, it is void. The requirement of the statute that the assessment should be made in the name of the owner, if it can be ascertained, is for the protection of the taxpayer, and to prevent a sacrifice of his property. Its strict observance, therefore, is imperative, and essential to jurisdiction. If, in such case, the assessment be made in the name of a person who is not the owner, or to persons unknown, it is void, and a subsequent sale of the property for nonpayment of the taxes levied thereunder is invalid, and passes no title to the purchaser. *Dowell v. City of Portland*, 13 Or. 248 (10 Pac. Rep. 308); *Black Tax Titles* (2d Ed.) §§ 105, Ill. 208; 25 Am. & Eng. Enc. Law, 212." Land upon which there has been given a deed of trust to secure debts should be assessed in the name of the trustee. Va. Code, § 459 construed and applied. *Stevenson v. Henkle*, 100 Va. 591 (42 S. E. Rep. 672). Construing and applying Wash. Laws 1893, p. 372, § 105; Laws 1895, p. 512, § 4, it is held that the assessor's omission to mention the name of the owner, or to assess it to an unknown owner, is not such a substantial defect as will invalidate a tax assessment on real property. *Coolidge v. Pierce County*, 28 Wash. 95 (68 Pac. Rep. 391).

Sec. 752. Assessment of taxes—Description of property. An assessment of land not occupied by the owner, but leased to others for agricultural purposes and not generally known by any particular name, by a description as "part of section in southwest $\frac{1}{4}$ N. E. $\frac{1}{4}$ section 27, township seventy-five, range 44; acres, eighteen; value, \$1,200," was held to be insufficient, under Ia. Code 1873, § 821, requiring land to be assessed "by township, range, section or part of section, and when such part is not a congressional division or subdivision, some other description sufficient to identify it." *Armour v. Officer*, 116 Ia. 675 (88 N. W. Rep. 1058). A description of property as the "W. 2-3 part of P. C. No. 331, five (5) cottages and barn (less lot deeded to Jno. Barrow)," was held not void for indefiniteness. *Harts v. City of Mackinac Island*, 131 Mich. 680 (92 N. W. Rep. 351). Where a mining company has treated its mining claims as a consolidated group, and procured a patent for them as such, a description of the property by the assessor as the "Eureka District Gold Mining Company, Survey 420," being the description used in the patent, which conveyed the claims as having been grouped under one survey, and showing the number of acres covered, and the value placed thereon by the assessor, is sufficient for the purpose of taxation. *Eureka Dist. Gold Min. Co. v. Ferry County*, 28 Wash. 250 (68 Pac. Rep. 727). For particular descriptions held sufficient, see *Koelling v. People*, 196 Ill. 353 (63 N. E. Rep. 735); *Otis v. People*, 196 Ill. 542 (63 N. E. Rep. 1053). For particular descriptions held insufficient, see *Stokes v. Allen*, 15 S. Dak. 421 (89 N. W. Rep. 1023); *Miller v. Williams*, 135 Cal. 183 (67 Pac. Rep. 788).

Sec. 753. Assessment of taxes—Omission of property. The unauthorized omission from taxation of a large portion of land in a certain township, on account of its having been conveyed to the state as tax homestead lands, under Mich. Laws 1893, ch. 206, §§ 127-134, does not invalidate the taxes assessed against the remaining lands in the township, where the authorities in making the exemption acted in good faith but under a misconstruction of the law. *Auditor General v. Sage Land & Imp. Co.*, 129 Mich. 182 (88 N. W. Rep. 468; 56 L. R. A. 105). Proceedings for the assessment of property omitted from taxation, brought under Ky. Stat., § 4021, must be commenced within five years after the failure to assess such property. *Commonwealth v. Hamilton*, (Ky.) 72 S. W. Rep.

744 (24 Ky. Law Rep. 1944). Hurd's Ill. Rev. Stat., 1899, ch. 120, §§ 276, 277 construed and applied—omitted property—subsequent assessment. Wabash R. Co. v. People, 196 Ill. 606 (63 N. E. Rep. 1084).

Sec. 754. Lien for taxes. A purchaser or mortgagee of land is charged with notice of the statutory lien for taxes and its priority. State v. Hulick, 67 N. J. L. 496 (51 Atl. Rep. 493). Burns' Ind. Rev. Stat., § 8632 construed and applied—right of holder of invalid tax deed to lien of the state for taxes paid by the sale. Dixon v. Eikenberry, Ind. App. (65 N. E. Rep. 938). Under Neb. Comp. Stat. 1899, ch. 77, § 138, taxes upon real estate are a lien thereon from and including the first day of April in the year in which they are levied until the same are paid. Cushman v. Taylor, (Neb.) 90 N. W. Rep. 207. Construing and applying 3 N. J. Gen. Stat., p. 3407, § 560, it is held that taxes assessed by the common council of a city do not become a lien until the rate of levy has been fixed. Hallinger v. Zimmerman, 63 N. J. Eq. 100 (51 Atl. Rep. 936). Applying Bal. Ann. Wash. Codes & Stat., § 1738, it is held that a guardian who, without funds of his wards in his hands, pays out of his money taxes on their real estate, may have a lien thereon for the repayment of the amount. Burgert v. Caroline, 31 Wash. 62 (71 Pac. Rep. 724; 96 Am. St. Rep. 889). The fact that a tax certificate and sale are nullified by the purchaser's failure to take out a deed within the time fixed by statute does not affect the statutory lien of the taxes. Wash. Laws 1893, p. 524, §§ 88, 130, 133 construed and applied. Denman v. Steinbach, 29 Wash. 179 (69 Pac. Rep. 751).

Sec. 755. Sale of land for taxes—Miscellaneous notes. The exemption of a homestead from sale for taxes on other property, provided for by Ia. Code, 1873, § 876, applies only when the homestead is listed separately. Bitzer v. Becke, Ia. (89 N. W. Rep. 193). The fact that a receiver has been appointed to take charge of property does not prevent its sale for taxes, and a purchaser at such sale having obtained a deed may take possession, without leave of the court or suit therefor, no one being in possession; and in such a case, the sale and deed being regular on its face, the receiver is left to such action as is afforded him by law in the courts of the county where the property is situated, as the parties to the litigation

may care to institute, and the court may approve, to test any irregularities leading up to the sale, if there were any. *Metclafe v. Commonwealth Land & Lum. Co.'s Receiver*, Ky. (68 S. W. Rep. 1100; 24 Ky. Law Rep. 527). The provisions of Ga. Pol. Code, § 908, which requires that, when property which has not been returned for taxation is sold, there shall be an offer to rent or hire the property before the same is offered for sale, do not apply to sales of wild lands. *Barnes v. Carter* 114 Ga. 886 (40 S. E. Rep. 993). For a discussion and construction of the statutes of Iowa as to rights and remedies of insane person whose lands have been sold for taxes, see *Hawley v. Griffin*, Ia. (92 N. W. Rep. 113). Mich. Comp. Stat., § 3921, authorizing the auditor general to cancel tax deeds in certain cases does not apply to lands conveyed to the state for taxes in pursuance of Comp. Laws, § 3949, as amended by Pub. Acts 1899, No. 107. *State Land Office Com'r v. Auditor General*, 131 Mich. 147 (91 N. W. Rep. 153). Minn. Gen. Laws 1881, ch. 135 construed and applied—sale of forfeited lands—place of sale—notice. *Whitney v. Bailey*, 88 Minn. 247 (92 N. W. Rep. 974).

Sec. 756. Sale of land for taxes—Notice of tax sale.

A statute (Kan. Gen. Stat. 1901, § 7639) requiring notice of a tax sale to be published "once in each week for four consecutive weeks" is complied with by a notice published once in each week for four consecutive weeks prior to the day of sale, although the first publication was made 25 days only before the sale. *Tidd v. Grimes*, 66 Kan. 401 (71 Pac. Rep. 844). The proper posting and publication by the county auditor of the notice of a tax sale, as required by Minn. Stat. 1894, § 1591, is necessary in order to give him jurisdiction to make the sale, the statute being regarded as mandatory; and a statute (Laws 1901, ch. 105) attempting to validate tax sales made without the notice required by this section is unconstitutional and void. *McCord v. Sullivan*, 85 Minn. 344 (88 N. W. Rep. 989; 89 Am. St. Rep. 561). See opinion for discussion of this subject. The recital in a tax certificate that the notice of sale was duly given is not rebutted by the mere fact that no affidavit of the posting of the notice of a tax sale is found with the files and records of the tax proceedings. *Cook v. John Schroeder Lum. Co.*, 85 Minn. 374 (88 N. W. Rep. 971). The description of land in a published notice of sale for delinquent taxes is sufficient if it is calculated to enable a person of ordi-

nary intelligence to identify it with reasonable certainty. See opinion for application of this rule to description by abbreviations and characters. *Dougherty v. Real Estate Title Ins. & T. Co.*, 85 Minn. 518 (89 N. W. Rep. 853). As to sufficiency of description in notice of tax sale, see *Lee v. Crawford*, 10 N. Dak. 482 (88 N. W. Rep. 97). Neb. Comp. Stat., ch. 77, § 109 requires the county treasurer, in his notice of a tax sale, to give a list of the land to be sold, and the amount of the taxes due thereon, but does not require the treasurer to include in the notice the amount of the interest due on the taxes up to the day of the sale. *Stevens v. Paulsen*, 64 Neb. 488 (90 N. W. Rep. 211).

Sec. 757. Sale of land for taxes—Posting of notice of sale. Construing and applying Wis. Rev. Stat. 1898, §§ 1130, 1132, 1141, requiring the county treasurer to post up copies of the list of delinquent taxes and notice of sale “in at least four public places in said county, one of which copies shall be posted up in some conspicuous place in his office,” and that affidavits of such posting shall be made by him, it is held that the inside of the door of his office is a conspicuous and proper place for the posting of a notice, and that the affidavits of the posting of notices are not fatally defective because reciting that the notices were posted “at,” instead of “in,” certain described places. *Allen v. Allen*, 114 Wis. 615; (91 N. W. Rep. 218). The court say: “There were several affidavits of posting duly filed. One affidavit stated that one of the notices was posted up ‘at the inside door of the treasurer’s office,’ April 17, 1893; three other affidavits showed, respectively, that the notice was, on the 17th day of April, posted up ‘at the postoffice in the village of Hillsboro in said county,’ ‘at the postoffice on the outside of the building in the village of Westboro in said county,’ and ‘at the postoffice building in the village of Coon Valley in said county.’ The claim is that these affidavits do not satisfy the requirements of the statute, and the case of *Hilgers v. Quinney*, 51 Wis. 62 (8 N. W. Rep. 17), is relied on in support of the contention. In that case it was held that an affidavit which stated that the notices were posted up at four public places in the village of Chilton in said county, —‘one at the Chilton House, one at the drug store of William Mahoney, one at the Washington House, and one at the office of the county treasurer,’—was insufficient, because: (1) Four public places in the village of Chilton were not necessarily four

public places, so far as the county was concerned; (2) because 'at' is not synonymous with 'in;' and (3) because it did not appear that the posting in the treasurer's office was in a 'conspicuous place.' It must be conceded that the decision was an extremely strict one, and we certainly do not feel that it should be extended to a case not squarely within its lines. This court has held—*Hart v. Smith*, 44 Wis. 213—that it will be presumed that postoffices in cities and villages are public places, and that posting therein constituted posting in public places, though the affidavit does not state that they are public places. There can be no doubt, therefore, that the affidavit in the present case show posting 'at' three public places in the county. Should the 'inside door' of the county treasurer's office be presumed to be a 'conspicuous place' in such office? We think it should. The words should be given their natural meaning, and they naturally indicate an inner entrance door into the treasurer's office, and hence, necessarily, a conspicuous place in the office. There is only left to be considered the question whether the use of the word 'at' instead of 'in' is fatal. Notwithstanding what was said on this subject in the *Hilgers Case*, we do not feel that we ought to hold that this variance alone is fatal. The word 'post,' when used in the present connection, means 'to attach to a post, a wall, or other usual place of affixing public notices' (*Webst. Int. Dict.*); 'to bring to the notice or attention of the public by affixing to a post, or putting up in some public place' (*Standard Dict.*). Giving the word this meaning, it seems certain that posting 'at' a public place is substantially the equivalent of posting 'in' a public place, and we therefore hold that the affidavits of posting in the present case were sufficient."

Sec. 758. Who may purchase at tax sale. A mortgagee authorized by the terms of his mortgage to pay the taxes on the mortgaged premises and add the amount so paid out to the mortgage debt, can not acquire a valid tax title to the premises by purchasing them at a sale made for such taxes. *Finlayson v. Peterson*, 11 N. Dak. 45 (89 N. W. Rep. 855). A second mortgagee having a right to redeem from a tax sale can not, by purchasing at such sale or afterwards acquiring the tax title, assert it so as to impair the rights of the holder of the first mortgage. *Davis v. Evans*, 174 Mo. 307 (73 S. W. Rep. 512). Neither the mortgagor nor his grantee can displace the mortgage lien by a purchase of the mortgaged property at a tax sale thereof, or by redeeming from such a sale.

Shrigley v. Black, 66 Kan. 213 (71 Pac. Rep. 301). Where one has secured his obligation by the pledge of the note of another secured by mortgage on real estate, he can not, as against his creditor, decrease the value of such security by purchasing such real estate at a tax sale. Such a purchase, as between such parties, will be held as a payment of the tax. And one receiving from such a debtor a tax sale certificate so obtained as security for a debt owing to him from the tax-sale certificate holder, with knowledge of all the facts, stands in no better position than the original tax purchaser, and equity will cancel and set aside such tax-sale certificate in the hands of such a one, at the suit of one wronged by the issuance of such tax-sale certificate. *Manley v. Debentures "B" Liquidation Co.*, 64 Kan. 573 (68 Pac. Rep. 31). A lessee bound by the covenants of his lease to pay all taxes on the property who makes a fictitious and fraudulent assignment of his lease and then neglects to pay the taxes and purchases the property at a sale therefor, will be held to hold the title for his lessor. *Oppenheimer v. Levi*, 96 Md. 296 (54 Atl. Rep. 74; 60 L. R. A. 729). See opinion for collation of cases on this subject. The rule prohibiting a life tenant from purchasing at a sale for taxes which it was his duty to pay will be applied to prevent a subsequent grantee of one claiming title through a conveyance by such life tenant purporting to convey the fee, from acquiring the title of the state, based on a forfeiture of taxes while the life tenant was in possession, which had accrued a long time previous to his acquisition of title to the property. *McFarlane v. Grober*, 70 Ark. 371 (69 S. W. Rep. 56; 91 Am. St. Rep. 84). As to right of cotenant to purchase at tax sale, see *Allen v. Allen*, 114 Wis. 615 (91 N. W. Rep. 218).

Sec. 759. Title and rights of purchaser at tax sale.

The purchaser of land at a tax sale is not entitled to be placed in possession until after the time for redemption has expired. *Elrod v. Groves*, 116 Ga. 468 (42 S. E. Rep. 731). A purchaser of lands at a tax sale in possession under his certificate of sale is not authorized by the common law nor by 3 N. J. Gen. Stat., p. 3354, § 337 et seq. to cut timber trees. *Brewer v. Ireland*, 67 N. J. L. 31 (50 Atl. Rep. 437). In Kansas it is held that the title to property subject to taxation conveyed by a tax deed is an original, not a dependent, title, and is unaffected by any prior grant, lien, charge, assessment, or incumbrance thereon. The effect of such deed is to extinguish

and destroy all prior grants, liens, charges, assessments and incumbrances upon the property conveyed, in existence at the time of levying the taxes upon which the tax deed rests for its support, including all prior tax deeds and liens claimed for taxes paid on the property thereby conveyed. *Douglass v. Powell*, 64 Kan. 533 (67 Pac. Rep. 1106). A statute (Va. Code, § 661) providing that the right or title acquired by a tax sale "shall stand vested in the grantee in such deed as it was vested in the party assessed with the taxes or levies on account whereof the sale was made," refers to the character of the title that shall be vested in the grantee in such deed, whether it be a fee simple or otherwise; and it has no reference to liens and does not mean that the purchaser takes the land subject to the liens resting thereon at the time the taxes were assessed. *Stevenson v. Henkle*, 100 Va. 591 (42 S. E. Rep. 672). The power to sell lands for taxes is a naked power, and in the absence of a statute relieving him, the burden is upon the purchaser at such a sale, when the validity of his title is challenged, to show affirmatively that every statutory requirement essential to the exercise of the power has been complied with. *State v. Inhabitants of Union Tp.*, 68 N. J. L. 133 (52 Atl. Rep. 238). Ala. Code, §§ 4078, 4083, 4084 construed and applied—payment of subsequent taxes by purchaser—lien. *Sheffield City Co. v. Tradesmen's Nat. Bank*, 131 Ala. 185 (32 So. Rep. 598).

Sec. 760. Title and rights of purchaser at tax sale—Easements and rights previously granted to others. A tax sale of land under an assessment made in the name of the general owner passes the title free of a right in a city to dig and remove gravel therefrom, claimed under a duly recorded deed by a previous owner. *Hunt v. City of Boston*, 183 Mass. 303 (67 N. E. Rep. 244). The court say: "The rule generally stated is that a sale of land for a valid tax gives a paramount title, free from the ownership or incumbrance of rights previously existing which had been carved out of the property by an owner, or which had been acquired in it by prescription or otherwise. *Langley v. Chapin*, 134 Mass. 82; *Parker v. Baxter*, 2 Gray, 185; *Perry v. Lancy*, 179 Mass. 183-186 (60 N. E. Rep. 472); *Emery v. Boston Terminal Co.*, 178 Mass. 172-184 (59 N. E. Rep. 763; 86 Am. St. Rep. 473); *Hefner v. Northwest Life Ins. Co.*, 123 U. S. 747-751 (8 Sup. Ct. Rep. 337; 31 L. Ed. 309); *Textor v. Shipley*, 86 Md. 424-438 (38

Atl. Rep. 932); *Byington v. Rider*, 9 Ia. 566-568; *McQuity v. Doudna*, 101 Ia. 144-146 (70 N. W. Rep. 99). It would be impracticable for assessors, in making assessments, to ascertain the various interests in real estate held by the several tenants occupying large buildings in our great cities, and it would be even more impracticable, in collecting taxes by a sale of real estate, to make sales only of the particular title and interest held and retained by the general owner; leaving untouched all other interests in the property which he had created by valid conveyances for long or short terms. We can conceive of conditions, like the ownership of estates of freehold in different portions of the same land, such as a title in fee to the mines in one owner, and a title to the soil in another, which might give rise to difficult questions which we need not decide in this case. But confining ourselves to the facts before us, we are of opinion that a sale of the land on a tax against the general owner gave a title which was good as against the city, after the time for redemption from the sale had expired."

Sec. 761. Irregularities sufficient to avoid or invalidate a tax sale. A sale of realty for the nonpayment of taxes, made on a day not authorized by law, is void. *Penrose v. Doherty*, 70 Ark. 256 (67 S. W. Rep. 398). The sheriff, as ex officio collector, may file with the clerk of the county court the list or lists of delinquent taxes required to be so filed by such "collector" by Sand. & H. Ark. Dig., § 6603, but this rule does not extend to a deputy sheriff; and a forfeiture of lands to the state based on a list so filed will not sustain a sale of the lands. *Quertermous v. Walls*, 70 Ark. 326 (67 S. W. Rep. 1014). Where a tract of land containing several legal subdivisions, owned in severalty by two persons, but assessed to unknown owner as a single and entire tract, is sold in solido at a tax sale and purchased by one of said owners, such sale is void. *Howell v. Shannon*, 80 Miss. 598 (31 So. Rep. 965; 92 Am. St. Rep. 609). A sale of a 72-acre tract of land without first offering 40 acres, and then adding the remainder and offering that, as required by Miss. Code, 1892, § 3813, is void. *Herron v. Jennings*, Miss. (31 So. Rep. 965). Construing numerous statutes of Oregon, it is held that a sale of acreage land and city lots $1\frac{3}{4}$ miles away en masse is void. *Brentano v. Brentano*, 41 Or. 15 (67 Pac. Rep. 922). In West Virginia the failure of the sheriff to include in his affidavit appended to his list of sales of delinquent lands the statement "nor have I at any

time been directly or indirectly interested in the purchase of any of said real estate," is a fatal defect in the sale, and invalidates a deed made in pursuance of a purchase at such sale. *McClain v. Batton*, 50 W. Va. 121 (40 S. E. Rep. 509). A statute (W. Va. Code 1868, ch. 31, § 7), providing that if a sale by a sheriff of delinquent lands certified to him "be not completed on the first day it shall be continued from day to day (Sundays excepted) * * * until it shall be completed," does not authorize him to adjourn a sale begun on December 2, 1871, until January 9, 1872, and complete the sales on such last named date; and such an adjournment invalidates a sale made in pursuance thereof. *Collins v. Sherwood*, 50 W. Va. 133 (40 S. E. Rep. 603). Construing and applying W. Va. Code, ch. 31, § 3, 4, requiring the auditor to certify the real estate for sale to the sheriff of the county in which it is situated, it is held that if the auditor, through mistake or otherwise, certify for sale a tract of land delinquent for the nonpayment of taxes due thereon to the sheriff of the county in which such land is not situated at the date of such certification, a sale thereof made by such sheriff is illegal and void; and a deed made in pursuance thereof by the clerk of the county court is likewise void, and vests no title in the purchaser. *White v. Wilkinson*, 51 W. Va. 196 (41 S. E. Rep. 136). The failure of the clerk to keep the record of sales of lands to the state, required by Sand & H. Ark. Dig., § 6612, renders void a sale of lands to the state for the nonpayment of taxes. *Quertermous v. Walls*, 70 Ark. 326 (67 S. W. Rep. 1014).

Sec. 762. Irregularities insufficient to avoid or invalidate a tax sale. The fact that the owner of property sold for taxes is described in the assessment, advertisement, and sale as the "Basic City Chilled Roller & Iron Works Co.," instead of "Basic City Chilled Roll & Iron Works," does not nullify the proceedings culminating in a tax deed, where it appears that the true owner had full knowledge of such proceedings. *Stevenson v. Henkle*, 100 Va. 591 (42 S. E. Rep. 672). A tax sale is not invalidated by the fact that the printer's affidavit of the publication of the list of delinquent taxes and notice of sale, required by Wis. Rev. Stat. 1898, § 1132, is not filed until 10 days after the last publication. *Allen v. Allen*, 114 Wis. 615 (91 N. W. Rep. 218). If land is offered at a tax sale to the bidder, if any there be, who will pay the amount for which it is to be sold, and bid in by the state in default of

other bidders, and a record thereof made, no irregularity in the conduct of the sale will render it invalid. *Cook v. John Schroeder Lumber Co.*, 85 Minn. 374 (88 N. W. Rep. 971). Delay of a purchaser at tax sale in paying to the treasurer the taxes and costs due on the land sold, owing solely to the large number of tracts of land to be sold, and inability of the treasurer, with the clerical force at his disposal, to make the sale in its regular order at an earlier date, does not invalidate a sale otherwise regular. *Leavitt v. S. D. Mercer Co.*, 64 Neb. 31 (89 N. W. Rep. 426); *Ure v. Bun*, (Neb.) 90 N. W. Rep. 904. Under the statutes of Wisconsin a sale of land for taxes which could have been collected from the personalty of the person liable therefor is void; but a county treasurer's return that he had no personalty from which the tax could be collected is conclusive. *Allen v. Allen*, 114 Wis. 615 (91 N. W. Rep. 218).

Sec. 763. Setting aside tax sale—Rights of purchaser—Tender and payments required of one recovering the property. The right of the holder of a tax deed which has been adjudged void to recover from the successful party the amount paid by such holder at the tax sale and subsequent taxes paid by him, does not exist independent of a statute; and Mo. Laws 1897, p. 74 does not give such relief. *Rowe v. Current River Land & Cattle Co.*, 99 Mo. App. 158 (73 S. W. Rep. 362). In discussing this subject the court say: "The bare or latent equity of the holder of an invalid tax deed or title is lifeless and nonenforceable without express statutory recognition, and, in the absence of such legislation, the lien of the state does not pass, and the doctrine of subrogation is not applicable to the tax-title purchaser. As to the purchase price representing the taxes for which the sale is made, he has bought at his own peril, and the doctrine of caveat emptor is rigidly applied, and as to such amounts as he may pay for taxes thereafter accruing he is treated as a mere volunteer seeking to obtrude as a creditor to whom relief will be denied even in equity." In an action to recover the possession of real estate from one holding under a voidable tax deed, rents and profits may be set off against the taxes paid. *Longworth v. Johnson*, 66 Kan. 193 (71 Pac. Rep. 259). Construing and applying N. Mex. Comp. Laws, §§ 4070-4072, it is held that the purchaser at a tax sale, whose deed is void because of a void assessment, may recover the sum paid. *Stewart v. Board of Com'rs*, N. Mex. (70 Pac. Rep. 574). A holder of a tax deed ob-

tained under a sale made for an illegal and void tax can not recover from the owner of the fee a sidewalk assessment paid by such holder to protect his title. *Clay v. Hammond*, 199 Ill. 370 (65 N. E. Rep. 352; 93 Am. St. Rep. 146). Kan. Gen. Stat. 1901 § 7681 construed and applied—rights of holder of tax deed upon recovery of property from him. *Polenqueen v. McAllister*, 64 Kan. 263 (67 Pac. Rep. 826).

Construing and applying Hurd's Ill. Rev. Stat., 1899, ch. 120, § 224, providing that any judgment or decree of court setting aside a tax deed shall provide for the payment to the holder of such tax deed of all taxes and legal costs and penalties provided by law, as it should appear the holder of such tax deed or assigns had properly paid, it is held that where an adverse holder of real estate who has entered into possession after a tax sale of the premises petitions under the Torrens system of land transfers for the registration of a fee-simple title, the holder of the tax title was entitled to be reimbursed for taxes paid in acquiring such title, with interest and costs, though the tax title is invalid. *Gage v. Consumers' Electric Light Co.*, 194 Ill. 30 (64 N. E. Rep. 653). This statute is held to have no application to a judgment in ejectment in which a tax deed is held invalid. *Gloss v. Patterson*, 195 Ill. 530 (63 N. E. Rep. 272). But where a bill is filed to set aside a tax deed, the decree should provide that the complainant pay within a time fixed in the decree the sum awarded the defendant for his taxes, etc., paid to obtain the deed and under the deed, and should provide that, if such sum is not so paid, the bill should be dismissed. *Glos v. Cratty*, 196 Ill. 193 (63 N. E. Rep. 690). It is proper to decree costs against a plaintiff in an action to set aside tax deeds where he fails to make the required tender. *Glos v. Woodard*, 202 Ill. 480 (67 N. E. Rep. 3). A statute (2 Bal. Ann. Wash. Codes & Stat., § 5678,) requiring that a person bringing an action to enjoin the sale of the land for taxes, or to enjoin the collection of a tax, or an action at law for the recovery of property sold for taxes shall first pay or tender the amount of taxes justly due and unpaid, applies where the action is to remove a cloud on title, consisting of a tax-purchase certificate. *Denman v. Steinbach*, 29 Wash. 179 (69 Pac. Rep. 751). When the holder of an invalid tax deed and those under whom he claims have paid no purchase money, taxes, or costs under or in procuring the same, the person entitled to have the deed set aside need not tender or pay him anything, or offer to do so, in attacking such

deed. *Collins v. Sherwood*, 50 W. Va. 133 (40 S. E. Rep. 603). As to payments required in West Virginia of person setting aside tax deed, see *McClain v. Batton*, 50 W. Va. 121 (40 S. E. Rep. 509).

Sec. 764. Redemption from tax sale. The right of redemption from tax sales, although it is to be regarded favorably, does not exist except as permitted by statute. *McMillan v. Hogan*, 129 N. C. 314 (40 S. E. Rep. 63). Citing, *Keely v. Sanders*, 99 U. S. 441, 445 (25 L. Ed. 327, 328); *Levy v. Newman*, 130 N. Y. 11 (28 N. E. Rep. 660); *Smith v. Macon*, 20 Ark. 17; *McGee v. Bailey*, 86 Ia. 513 (53 N. W. Rep. 309); *Metz v. Hipps*, 96 Pa. 15. The right to redeem from a tax sale is statutory, and the time given by the statute for redemption can not be extended by a decree in equity, although awarded in an action brought before such period had expired; and a redemption can not be effected by the payment of the redemption money into court under such decree after the expiration of the statutory period of redemption. *Bitzer v. Becke*, Ia.

(89 N. W. Rep. 193). An owner of land sold for taxes, seeking to redeem from such sale by virtue of a parol agreement giving him such right, must act promptly; and his right will be held to be barred by his failure for eleven years to assert it, during which the property has increased in value and the rights of third parties have intervened. *Converse v. Brown*, 200 Ill. 166 (65 N. E. Rep. 644). See opinion for particular evidence held insufficient to show such an agreement. A judgment debtor may redeem from a tax sale of land on which his judgment is a lien. *Swan v. Harvey*, 117 Ia. 58 (90 N. W. Rep. 489). Where money to redeem from tax sale is sent the county treasurer in the name of the person to whom the land is assessed, and by one purporting to be her agent, the proof of ownership is sufficient to justify the treasurer in issuing a certificate of redemption. *State v. Cranney*, 30 Wash. 594 (71 Pac. Rep. 50). Cal. Pol. Code, §§ 3815, 3817, as amended by Stat. 1897, p. 433, construed and applied—redemption of land sold for taxes and purchased by the state—assessments on land after the sale. *San Diego, C. & E. Ry. Co. v. Shaffer*, 137 Cal. 103 (69 Pac. Rep. 855). Cal. Pol. Code, § 3817 construed and applied—redemption from tax sale to the state—sums to be paid—penalty and interest. *Collier v. Shaffer*, 137 Cal. 319 (70 Pac. Rep. 177); *San Diego Inv. Co. v. Shaffer*, 137 Cal. 323 (70 Pac. Rep. 179). Ia. Code, §§ 1436-1439 construed and

applied—validity of redemption made on order of county supervisors by payment of compromise sum. *Everson v. Woodbury County*, 118 Ia. 99 (91 N. W. Rep. 900). A redemption from a sale of mortgaged real estate to satisfy a lien for taxes thereon, made under Kan. Gen. Stat. 1901, § 4949, by a grantee of the mortgagor, does not free the real estate from the lien of the mortgage. *Shrigley v. Black*, 66 Kan. 213 (71 Pac. Rep. 301). Under Minn. Gen. Stat. 1894, § 1603, providing that minors, insane persons, and others under disability, having an estate in or lien on land sold for taxes, may redeem the same within two years after such disability shall cease, such right of redemption is given thereby to a minor who has either a vested or contingent remainder in lands sold for taxes, and his right to redeem may be asserted in an action against him to determine adverse claims. See opinion for application of this rule to particular facts. *Minnesota Debenture Co. v. Dean*, 85 Minn. 473 (89 N. W. Rep. 848). As to redemption under Minnesota forfeiture tax sale law of 1899, see *State v. Peltier*, 86 Minn. 181 (90 N. W. Rep. 375).

Sec. 765. Redemption from tax sale—Extension of time on account of minority of persons entitled to redeem. N. C. Laws 1895, ch. 119, § 60, providing that "infants, idiots and insane persons may redeem any land belonging to them from such sale (after the expiration of such disability in like terms as if the redemption had been made within one year) from the date of said sale," is held not to extend the time of redemption of infant heirs from a tax sale of lands of their ancestor made before his death. *McMillan v. Hogan*, 129 N. C. 314 (40 S. E. Rep. 63). The court say: "By paragraph 7323, Gen. Stat. Kan. 1899, it is provided 'that lands of minors or any interest they may have in any land sold for taxes may be redeemed at any time before such minor becomes of age and during one year thereafter.' In *Doudna v. Harlan*, 45 Kan. 484 (25 Pac. Rep. 883), it is held that the right of redemption conferred by this paragraph applies only to lands in which minors have an interest at the time they are sold for taxes, and does not apply to lands which when sold belonged to their ancestor; approving *Stevens v. Cassady*, 59 Ia. 113 (12 N. W. Rep. 803), which is to the same effect. The same ruling is made in *McCormack v. Russell*, 25 Pa. 185, and in *Kulp v. Kulp*, 51 Kan. 341 (32 Pac. Rep. 1118; 21 L. R. A. 550). In *Black, Tax Titles* (2d Ed.) § 374, it is said: 'It may be laid

down as a general rule, obtaining under most systems, that, in order to entitle a minor to an extension of time for redemption of a tax sale beyond the regular statutory period, he must have been the owner of the property at the time of the sale.’”

Sec. 766. Notice of expiration of time to redeem. Cal. Pol. Code, § 3785 construed and applied—service of notice to redeem by posting where property is unoccupied. *Miller v. Williams*, 135 Cal. 183 (67 Pac. Rep. 788). A tax deed issued without the service of the proper notice of the expiration of the time to redeem does not cut off the right of redemption; and, while such a deed is not void, it may be attacked without making the proof of title required by Ia. Code, § 1445 of one claiming title adverse to a tax title. *Swan v. Harvey*, 117 Ia. 58 (90 N. W. Rep. 489). Service of notice of expiration of time to redeem made by publication to a person in whose name the property is taxed is sufficient, although it is taxed in the wrong name by mistake. *Hawkeye Loan & Brokerage Co. v. Gordon*, 115 Ia. 561 (88 N. W. Rep. 1081). Minn. Gen. Stat. 1894, § 1654, requiring the giving of notice of the expiration of the period of redemption to the party in whose name the land is assessed repeals § 1655. *Beumer v. Woll*, 86 Minn. 294 (90 N. W. Rep. 530). If the officer authorized to assess land for taxation places it upon the assessment book or roll, in the county auditor's office, with its value and the name of the owner thereof, it is a sufficient assessment for the purpose of addressing the notice of the expiration of the period of redemption from a tax sale, as provided by Minn. Gen. Stat. 1894, § 1654, even if the assessment be defective. But in a case where the county auditor simply places unassessed land on the tax duplicate, and extends the taxes thereon at a valuation therein named, a notice addressed to the person named in the tax duplicate is not sufficient to bar the owner's right of redemption from a tax sale. *Walker v. Martin*, 87 Minn. 489 (92 N. W. Rep. 336). For construction of this statute as to sheriff's fees for service of notice, see *Doherty v. Real Estate Title Ins. & T. Co.*, 85 Minn. 518 (89 N. W. Rep. 853). Construing S. Dak. Laws 1901, ch. 14, § 121, requiring that notice of the expiration of the time for making of redemption from a tax sale to be made either personally or by publication “on the person in whose name the land is taxed,” it is held that a published notice addressed “to whom it may concern,” and not containing the name of the non-resident in whose name the

property was taxed, was insufficient. A tax deed void for want of the notice required by this statute can not be made effective by the issuance of an amended instrument of that character, without notice, more than three years after the execution of the original. *Rector & Wilhelmy Co. v. Maloney*, 15 S. Dak. 271 (88 N. W. Rep. 575). A notice under this statute which omits to give the section, township or range of the property is insufficient. *Stokes v. Allen*, 15 S. Dak. 421 (89 N. W. Rep. 1023).

Sec. 767. Tax deed. A statute prescribing a particular form for a tax deed must be substantially pursued or the deed will be held void. *Rector & Wilhelmy Co. v. Maloney*, 15 S. Dak. 271 (88 N. W. Rep. 575). Citing, *Lain v. Cook*, 15 Wis. 446; *Grimm v. O'Connell*, 54 Cal. 522; *Simmons v. McCarthy*, 118 Cal. 622 (50 Pac. Rep. 761). The same is held in Arizona; and, applying this rule, it is held that a tax deed containing no recital "of the name of the person, firm, company or corporation assessed, and from whom the taxes were due," or any statement that the same was "unknown," as required by Rev. Stat. 1887, par. 2701, is void. *Seaverns v. Costello*, Ariz. (71 Pac. Rep. 930). Under Ala. Code, § 4067, a certificate of tax sale is assignable "by endorsement;" and a deed issued to one who has taken an assignment of such a certificate by a separate instrument is unauthorized and void. *Capehart v. McGahey*, 132 Ala. 334 (31 So. Rep. 503). *Burns' Ind. Rev. Stat. 1901, § 8639*, setting out the irregularities required to defeat a tax deed, applies to a deed both as a conveyance and as a lien. The burden of proof as to the validity of a tax deed, issued under Ind. Laws 1872, p. 57, is not changed by subsequent legislation making tax deeds prima facie evidence of title. *Skelton v. Sharp*, 161 Ind. 383 (67 N. E. Rep. 535). The provision of Minn. Gen. Stat. 1894, § 1616, requiring the payment of current taxes upon lands forfeited to the state at a tax sale under that section, is mandatory, and the issuance of tax deed conveying title by the state through the county auditor, without the payment of taxes due, though not delinquent at the time it is executed, transfers no title to the purchaser. *Hoyt v. Chapin*, 55 Minn. 524 (89 N. W. Rep. 850). In Missouri, a tax deed based on an assessment to one not the owner of the land, and which contains no recitals showing that the statutory requirements had been complied with, but instead states the conclusion of the col-

lector that he had "advertised said real estate for sale according to law," is void on its face. *Brown v. Hartford*, 173 Mo. 183 (73 S. W. Rep. 140). N. Dak. Comp. Laws, § 1639 construed and applied—tax deed as evidence of regularity of sale. *Lee v. Crawford*, 10 N. Dak. 482 (88 N. W. Rep. 97). A sheriff's return showing a sale en masse of acreage land and city lots one and three-fourths miles distant is sufficient to vitiate a tax deed, notwithstanding a statute (Hill's Ann. Or. Laws, § 2823) making it prima facie evidence of the regularity of the proceedings. *Brentano v. Brentano*, 41 Or. 15 (67 Pac. Rep. 922). In South Dakota, a tax deed from which is omitted the statutory recital that the tax "had been duly assessed and properly charged on the tax book or duplicate for the year" of the assessment, is void on its face. *Horswill v. Farnham*, S. Dak. (92 N. W. Rep. 1082). A tax deed issued after the redemption of the property, under S. Dak. Laws 1891, ch. 14, § 118, is void. *Stokes v. Allen*, 15 S. Dak. 421 (89 N. W. Rep. 1023). For exhaustive collation of the statutes and decisions of Tennessee on the subject of tax deeds, see *Sheafer v. Mitchell*, 109 Tenn. 181 (71 S. W. Rep. 86). In Utah a tax deed is void where it is not shown that the tax collector ever received the warrant required by Comp. Laws, § 2029. *Asper v. Moon*, 24 Utah, 241 (67 Pac. Rep. 409). Under Va. Code 1849, ch. 37, § 22, a tax deed so acknowledged as to authorize its recording is ineffectual to vest the legal title in the grantee until recorded. *Leftwich v. City of Richmond*, 100 Va. 164 (40 S. E. Rep. 651). Under Wis. Laws 1859, ch. 22, § 50, a tax deed which did not name both the county and state as grantors was void, and such a deed was not validated by Laws, 1867, ch. 22. *Wine v. Woods*, 159 Ind. 388 (63 N. E. Rep. 759). Wis. Rev. Stat. 1898, § 1047 construed and applied—particular description in tax certificate held sufficient. *Cate v. Werder*, 114 Wis. 122 (89 N. W. Rep. 822). Parol evidence is not admissible to uphold or invalidate a tax deed, and it must be determined from the proceedings of record on which the deed is founded and from the face of the deed itself whether the deed is valid. *McClain v. Batton*, 50 W. Va. 121 (40 S. E. Rep. 509). Particular findings held to sustain a holding that a tax deed was void on its face. *Cornelius v. Ferguson*, S. Dak. (91 N. W. Rep. 460).

Sec. 768. Tax deed—Conclusiveness of recitals—Validity of deed to county purchasing as a competitive bidder.

Where a tax deed made to a county, in the form prescribed by S. Dak. Comp. Laws, § 1630 and which provides that "such deed shall be conclusive evidence of the truth of all the facts therein recited," recites, in effect, that the county had purchased the land as a competitive bidder in violation of a later statute (Laws 1891, p. 66, §§ 113, 114) providing that a county can not become a competitive bidder at a tax sale, such deed is void on its face. *Reckitt v. Knight*, S. Dak. (92 N. W. Rep. 1077); *Thompson v. Roberts*, S. Dak. (92 N. W. Rep. 1079). In the first case the court say: "In the recent case of *Hanenkratt v. Hamil*, 10 Okla. 219 (61 Pac. Rep. 1050), the court say: 'We take the law to be well settled that where the recitals in the tax deed show a sale to the county, and a deed obtained by virtue of a sale to the county, that the deed must contain recitals to show the right of the county to purchase at such tax sales; that, if the recitals of the tax deed show the county to be a competitive bidder at said tax sale, such recitals render the tax deed void; and that the recitals in a tax deed must show that the circumstances, surroundings, and conditions giving the county the statutory right to purchase at such sale existed at the time of such purchase by the county, and, unless such deed does contain such recitals, it is invalid on its face.' While, literally construed, the form for a tax deed was perhaps designed only for voluntary purchasers, as competitive bidders at public auction, no more than a substantial compliance therewith is required, and modifications sufficient to show valid action on the part of taxing officers is clearly within the spirit of the statute. From the recitations of the deed before us, it conclusively appears that, through the county treasurer, on the first day of the sale, and at public auction, the county voluntarily bid on the land, and purchased the same for the full amount due; and there is nothing tending to show that the property could not have been sold for an equal amount, at a lower rate of interest, to another purchaser. The proceeding was without authority of law, and the recital of such illegal sale renders the deed void upon its face.

In construing a similar statute in a number of cases, it has been uniformly held in Kansas that such a deed is void upon its face. Mr. Justice Brewer, speaking for that court, in *Magill v. Martin*, 14 Kan. 67, says: 'The only question in this case is as to the validity of a tax deed, and one of the objections to it is the same as that which was held fatal in the case

of *Norton v. Friend*, decided at the present term of this court [13 Kan. 532]. It recites a sale to the county, not as a result of a failure to sell to an individual, but as the result of competitive biddings, in which the county entered as a voluntary bidder. The county is not a voluntary bidder at a tax sale. It enters into no competition with individuals. It pays no money to the treasurer. It simply becomes the involuntary purchaser of that which no individual will buy. The distinction between a purchase by an individual and one by the county, and the reasons therefor, are clearly pointed out by Mr. Justice Safford in the opinion in the case of *Guittard Tp. v. Marshall Co. Com'rs*, 4 Kan. 388. Hence a deed which recites a purchase by the county under the same conditions as a purchase by an individual recites an unauthorized and illegal purchase. A deed showing an illegal sale must be void. But it may be urged that this ruling conflicts with the decision in *Hobson v. Dutton*, 9 Kan. 477, where it is said that "the rule is clear that, where the statute contains a form of any instrument, a compliance with that form is sufficient." This deed follows the form of the statute, and, according to that rule, must be held sufficient. The language of that opinion is general, and, so far as the facts of that case are concerned, states the law correctly. Yet we think here is found an exception. When the conditions of the sale are such that to follow the form is to recite an untruth, and show an illegal sale, the form must be modified to suit the facts. To make a statement of an illegal and void sale evidence of a legal and valid sale is a contradiction not to be imputed to the legislative intent. The statute says the deed shall be in substantial compliance with the form. It thus contemplates minor modifications, and those modifications must be such as to make the deed recite the truth, and comply with the conditions of valid action.' From the headnote, which is fully sustained by the opinion, in *Dyke v. Whyte*, 17 Colo. 296 (29 Pac. Rep. 128), we quote the following: 'The form of deed for individual purchasers should be substantially followed, as far as its terms are applicable to the county as a bidder, and be varied only so far as may be necessary to show the truth of the transaction in substance.' Judge Black says: 'It must not, by an erroneous following of the form, show a state of facts in which the county would not have been authorized to bid or buy, for then it would be void on its face.' Black, *Tax Titles*, 302. The statutory authority of a county to purchase land at tax sale must

be strictly pursued, and must be confined to the express provisions of the statute conferring the power. Consequently a deed bearing upon its face evidence of noncompliance with some essential requirement of the law, such as an illegal sale to the county, if made as recited, vests no title in the grantee, and is void upon its face. *Sprague v. Coenen*, 30 Wis. 209."

Sec. 769. Judicial proceedings to collect taxes. The doctrine that proceedings, conducted against, and in the name of, one who is dead, and which lead to the sale of property for taxes, convey no title, is inapplicable, where the holder of the recorded title is living. *Howcott v. City of New Orleans*, 107 La. 305 (31 So. Rep. 668). A decree for the sale of land for taxes made in proceedings which show want of jurisdiction is subject to collateral attack. *Tromble v. Hoffman*, 130 Mich. 676 (90 N. W. Rep. 694). For particular decree held sufficient, see *Newton v. Auditor General*, 131 Mich. 547 (91 N. W. Rep. 1030). A description of land in a tax judgment, as "S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ lot 2 and 3," was held to be a sufficient description of the S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and lots 2 and 3 of the section. *Cook v. John Schroeder Lum. Co.*, 85 Minn. 374 (88 N. W. Rep. 971). 3 Starr & C. Ann. Ill. Stat. 1896, p. 3480, § 194; p. 3494, § 226; p. 3502, § 232, construed and applied—action for taxes—presumption and proof as to ownership—title and rights of purchaser at sale under judgment *Coombs v. People*, 198 Ill. 586 (64 N. E. Rep. 1056). For construction of p. 3501, § 230 of this statute, see *Harding v. People*, 202 Ill. 122 (66 N. E. Rep. 962). For construction of Illinois statutes as to action to recover delinquent taxes due on forfeited property, see *Carrington v. People*, 195 Ill. 484 (63 N. E. Rep. 163). For exhaustive construction of statutes of Kentucky in reference to action by city of Louisville to recover taxes, see *Woolley v. City of Louisville*, Ky. (71 S. W. Rep. 893; 24 Ky. Law Rep. 1357). Mich. Laws 1893, Act No. 206, § 62 construed and applied—notice to interested parties. *Tromble v. Hoffman*, 130 Mich. 676 (90 N. W. Rep. 694). Miss. Code 1892, § 4200 construed and applied—action by revenue agent for delinquent taxes—parties and pleading. *Adams v. Stonewall Mfg. Co.*, 80 Miss. 84 (31 So. Rep. 544). Shannon's Tenn. Code, §§ 6190, 6193 construed and applied—judicial sale of realty for taxes—effect of death of owner before entry of decree for sale. *Dunham v. Harvey*, Tenn. (69 S. W. Rep. 772). Batt's Tex. Rev.

Stat., art. 1211 construed and applied—suit for taxes—effect of failure to appoint attorney for defendant served by publication who fails to appear. *Crosby v. Bannowsky*, 95 Tex. 449 (68 S. W. Rep. 47). Wash. Laws 1897, p. 186, ch. 71, § 104 construed and applied—action to foreclose certificate of delinquency—appeal. *Meagher v. Hand*, 28 Wash. 332 (68 Pac. Rep. 892); *Schultz v. Harris*, 31 Wash. 302 (71 Pac. Rep. 1009). For construction of Washington statutes in reference to actions by municipal corporations to foreclose lien for unpaid taxes, see *City of Port Townsend v. Eisenbeis*, 28 Wash. 533 (68 Pac. Rep. 1045). In West Virginia, a person who buys the title of the state to forfeited lands at a judicial sale is bound by the final decrees entered in the suit in which such sale is had, prior to the confirmation thereof, as though he were a party to such suit. *State v. Irwin*, 51 W. Va. 192 (41 S. E. Rep. 124).

Sec. 770. Foreclosure of tax lien and tax sale certificate. Where the remedy for the enforcement of taxes upon real estate by foreclosure of the tax deed or tax sale certificate is adequate and efficient, it will be regarded as exclusive. *Logan County v. Carnahan*, Neb. (92 N. W. Rep. 984). In Nebraska a tax lien can not be foreclosed until the owner has had two years in which to redeem and a petition seeking to foreclose a tax lien which does not show that the land has been sold for taxes, and that at least two years have expired after the date of the sale, does not state facts constituting a cause of action. *Iodence v. Peters*, 64 Neb. 425 (89 N. W. Rep. 1041). Neb. Comp. Stat. 1901, ch. 77, art. 5, §§ 1, 2 do not give an action for the foreclosure of a tax lien based exclusively upon an assessment and levy, but they give a right of action only to the holder of a tax deed or a tax sale certificate. *Logan County v. Carnahan*, Neb. (92 N. W. Rep. 984). Neb. Comp. Stat., ch. 77, art. 5, §§ 4, 6, providing for foreclosure of tax liens by proceedings in rem to which the land alone is made a party, and for cutting out all pre-existing rights or liens by sale under decree therein, are not in conflict with the state or federal constitutions, as depriving persons of property without due process of law. *Leigh v. Green*, 64 Neb. 533 (90 N. W. Rep. 255). See opinion as to practice in cases of this character. Where a lien is sought to be foreclosed for general taxes, the tax sale certificate is prima facie evidence that the statutes in reference to the levy and assessment of the taxes and

the sale for their nonpayment have been complied with, and the burden of showing irregularities is upon the party asserting such fact. *Merrill v. Wright*, 41 Neb. 351 (59 N. W. Rep. 787) overruled. *Darr v. Wisner*, 63 Neb. 305 (88 N. W. Rep. 518). In an action of foreclosure upon a tax sale certificate, and for prior and subsequent taxes and special assessment paid by the holder of the certificate, the certificate and receipts of the proper officer for prior and subsequent taxes and special assessments are prima facie evidence of the validity of the taxes which they represent. *Ure v. Reichenberg*, 63 Neb. 899 (89 N. W. Rep. 414); *Ryan v. West*, 63 Neb. 894 (89 N. W. Rep. 416); *Concordia Loan & T. Co. v. Van Camp*, (Neb.) 89 N. W. Rep. 744; *Starr v. Voss*, (Neb.) 89 N. W. Rep. 750. Where a tax deed is foreclosed within the time fixed by law, but subsequent incumbrancers are not barred, such incumbrancers are not relieved of the necessity of redeeming therefrom in a suit to assert their liens, by the fact that the statutory period for foreclosing the tax lien has expired. See opinion as to making mortgagees defendants and what is proper designation of them by name. *Gillian v. McDowell*, Neb. (92 N. W. Rep. 991). In Washington the holder of a delinquent general tax certificate is not required to pay local street assessment liens before he can proceed to foreclose and sell under his general tax lien. He is entitled to a decree establishing his tax lien as paramount and superior to all other liens or charges against the property. *McMillan v. City of Tacoma*, 26 Wash. 358 (67 Pac. Rep. 68); *Keene v. City of Seattle*, 31 Wash. 202 (71 Pac. Rep. 769); *State v. McConnaughey*, 31 Wash. 207 (71 Pac. Rep. 770). A mortgagee of land can not defend against the lien of a tax certificate holder on the ground that a gift to the latter of a quitclaim deed from the owner of the land merged the tax lien in the land title, without evidence showing an intent to produce the merger. *Gilman v. Stock Exch. Bank*, 64 Kan. 87 (67 Pac. Rep. 551).

Sec. 771. Statute of limitations and tax titles. Under Ala. Code 1896, § 4089, an action to recover lands sold for taxes is barred if not commenced within three years from the date when the purchaser became entitled to demand a deed, which, under § 4074, is after the expiration of two years from the date of sale. *Capehart v. Guffey*, 130 Ala. 425 (30 So. Rep. 390). Sand. & H. Ark. Dig., § 4819, which prohibits any one from bringing an action for the recovery of lands which have

come into the ownership of the state by virtue of the taxing laws, and have been purchased from the state, "unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the same, within two years next before the commencement of such suit or action," applies to persons under disabilities as well as to those *sui juris*. *Sparks v. Farris*, Ark. (71 S. W. Rep. 255). Construing and applying Ia. Code, § 1448, providing that no action for the recovery of real property sold for the nonpayment of taxes shall be brought after five years from the executing and recording of the treasurer's deed, etc., it is held that the statute begins to run at the time when the tax sale purchaser might have obtained his deed—that is, three years from the date of the sale. *Roth v. Munzenmaier*, 118 Ia. 326 (91 N. W. Rep. 1072). In Louisiana irregularities in a tax deed, and all errors of form not of such a character as to render a tax deed absolutely null and void, are cured by the prescription of three years. *Boyle v. West*, 107 La. 347 (31 So. Rep. 794). Neb. Comp. Stat., ch. 77, art. 1, § 180 prevents bringing an action against the county for refunding payments on illegal tax sales after five years have elapsed without any demand for deed or action of foreclosure. *McCague v. Douglas County*, Neb. (91 N. W. Rep. 412). Hill's Ann. Or. Laws, § 2840, requiring suits to recover lands sold for taxes to be brought within three years from the time of recording the tax deed, has no application where such deed shows on its face that the sale was made under a void assessment. *Lewis v. Blackburn*, 42 Or. 114 (69 Pac. Rep. 1024). The provision of the statute of South Dakota limiting the time of commencing an action for the recovery of land conveyed for the non-payment of taxes to three years after recording the tax deed does not run in favor of such deed when void upon its face. *Horswill v. Farnham*, S. Dak. (92 N. W. Rep. 1082). Wis. Rev. Stat. 1898, §§ 1189, 1210h construed and applied—limitation on action to set aside tax sale. *Chicago & N. W. Ry. Co. v. Arnold*, 114 Wis. 434 (90 N. W. Rep. 434). For construction of §§ 1188, 1189 on this subject, see *Kennan v. Smith*, 115 Wis. 463 (91 N. W. Rep. 986).

Sec. 772. Miscellaneous notes and construction of miscellaneous statutes. A county purchasing lands at a tax sale loses the title thus acquired by subsequently taxing the land and selling it for such taxes, so that its subsequent grantee

obtains no title. *Feltz v. Natalie Anthracite Coal Co.*, 203 Pa. St. 166 (52 Atl. Rep. 82). Where the owner of a lot assessed in his name correctly designates it to the tax collector and makes a payment of what he supposes to be the taxes thereon, there is such a payment as will defeat a sale of the lot for such taxes regardless of the fact that the officer applied the payment to the taxes on a different lot described in a deed exhibited by such owner and issued a receipt accordingly. *Gunn v. Thompson*, 70 Ark. 500 (69 S. W. Rep. 261).

Sand. & Ark. Dig., ch. 25 construed and applied—proceedings to confirm tax title—jurisdiction of court. *Beardsley v. Hill*, Ark. (72 S. W. Rep. 372). Cal. Pol. Code, §§ 3765, 3771, 3780 construed and applied—sale of land to state for delinquent taxes—suit for taxes. *Santa Barbara County v. Savings & Loan Soc.*, 137 Cal. 463 (70 Pac. 457). Ia. Code, § 1445 construed and applied—title and showing required of one assailing a tax deed. *Roth v. Munzenmaier*, 118 Ia. 326 (91 N. W. Rep. 1072). A statute (Miss. Code, § 3807), providing that no receipt for the payment of taxes other than that issued by the collector shall be valid as evidence, does not prevent parol proof of the payment of taxes, in order to defeat a tax sale, where the receipt given by the collector was insufficient on account of misdescribing the property. *Perret v. Borries*, 78 Miss. 934 (30 So. Rep. 59). Wash. Laws 1899, p. 295, §§ 82, 102, 111 construed and applied—payment of taxes on an undivided interest in land by a tenant in common. *State v. Reed*, 29 Wash. 383 (69 Pac. Rep. 1096). W. Va. Code, 1868, ch. 31, § 34 construed and applied—forfeiture of land to state for nonentry on assessor's books for taxation. *State v. Tavenner*, 49 W. Va. 696 (39 S. E. Rep. 649). See, on this subject, *Davis v. Living*, 50 W. Va. 431 (40 S. E. Rep. 365); *Bowman v. Dewing*, 50 W. Va. 445 (40 S. E. Rep. 576).

TENANTS IN COMMON.

EPITOME OF CASES.

Sec. 773. Creation of an estate in common. A devise of land to two persons "jointly" creates a tenancy in common, under *Starr & C. Ann. Ill. Stat. 1896*, p. 916, ch. 30, par. 5; the word "jointly" not being sufficient to show, clearly and explicitly, that the testator intended that the estate devised should possess the attributes of survivorship. *Mustain v. Gardnar*, 203 Ill. 284 (67 N. E. Rep. 779). Under *Mo. Rev. Stat. 1899*, § 4600, a devise of land to two or more persons creates a tenancy in common unless the creation of a different estate is expressly declared. *Lemmons v. Reynolds*, 170 Mo. 227 (71 S. W. Rep. 135). For particular conveyances held to create estates in common, see *Pickett v. Garrard*, 131 N. C. 195 (42 S. E. Rep. 579); *Sease v. Sease*, 64 S. C. 216 (41 S. E. Rep. 898).

Sec. 774. Sale and conveyance of estate in common. A tenant in common of land who obtains judgment against his cotenant for part of the purchase price received by such cotenant on a sale of the land by the latter thereby confirms the sale. *Nalle v. Parks*, 173 Mo. 616 (73 S. W. Rep. 596). Tenants in common who ratify the unauthorized contract of their cotenant for the sale of the premises by the execution of a deed in pursuance thereof, which is refused by the purchaser, are not bound by a subsequent and different agreement made by such cotenant. *Smith v. Hogle*, 116 Ia. 645 (88 N. W. Rep. 820). Where the husband is the only person named in the granting part of a conveyance of lands held by him and his wife as tenants in common, and the only mention of her is a clause in which she is named and designated as his wife releasing her dower and claim of homestead in the premises, the conveyance is insufficient to pass her moiety in the land. *Penny v. British & American Mortg. Co.*, 132 Ala. 357 (31 So. Rep. 96).

Sec. 775. Buying in outstanding titles and discharging incumbrances. The general rule that one tenant in

common can not acquire an outstanding title adverse to his cotenant, and that the purchase of such a title inures to the benefit of all the cotenants upon equitable contribution being made, does not apply where the cotenants have acquired their respective titles by different instruments and at different times, and no relation of trust or confidence exists between them, and also where the outstanding title has not been created or suffered to arise through the default of the purchasing cotenant. *Boyn-ton v. Veldman*, 131 Mich. 555 (91 N. W. Rep. 1022). Citing, *Sands v. Davis*, 40 Mich. 14-19; *Watkins v. Green*, 101 Mich. 493-497 (60 N. W. Rep. 44); *Freem Co-Ten.* § 155; 2 *Rice*, Mod. Law Real Prop. § 410; *Elston v. Piggott*, 94 Ind. 14-26; *Myers v. Reed*, (C. C.) 17 Fed. Rep. 401-406 (9 Sawy. 132); *Roberts v. Thorn*, 25 Tex. 728 (78 Am. Dec. 552-554); *Miller v. Donahue*, 96 Wis. 498 (71 N. W. Rep. 900-904); *Fielding v. White*, (Tex. Civ. App.) 32 S. W. Rep. 1054. The right of a tenant in common to share in the benefit of the purchase of an outstanding title by his cotenant is lost where he fails to elect within a reasonable time to make the requisite contribution. *Nalle v. Parks*, 173 Mo. 616 (73 S. W. Rep. 596). A co-owner or tenant in common, who purchases the property held in common at a sale for taxes assessed against his co-owners and him-self, acquires no greater interest in the property than he held before, except that he has a claim against his co-owners for reimbursement according to their respective shares. *Hake v. Lee*, 106 La. 482 (31 So. Rep. 54). As to the right of a tenant in common to acquire a tax title to the common property, see *Blumenthal v. Culver*, 116 Ia. 326 (89 N. W. Rep. 1116). When tenants in common mortgage the common property, and are given different times for redemption in a decree of fore-closure, and the tenant whose time expires first fails to redeem, and the other tenant, after the expiration of that time, and within the time allowed to him, redeems the premises by paying the amount of the decree to the clerk, the premises become re-deemed, and the operation of the decree arrested. But the mortgage is not thereby extinguished. If the tenant who fails to redeem does not pay his just portion of the mortgage debt, he may be foreclosed by the other tenant; but until such fore-closure the relation of the parties to the common property is that of tenants in common. *Deavitt v. Ring*, 73 Vt. 298 (50 Atl. Rep. 1066).

Sec. 776. Ouster. One tenant in common of land can not maintain against a cotenant an equitable proceeding having

for its purpose the complete ousting of the latter from the possession of the land held in common, and from all participation in the profits thereof. *Thompson v. Sanders*, 113 Ga. 1024 (39 S. E. Rep. 419). Ouster is a question of fact, which involves to some extent the intention and motives of the parties in possession. *Beall v. McMenemy*, 63 Neb. 70 (88 N. W. Rep. 134; 93 Am. St. Rep. 427). Citing, *Highstone v. Burdetts*, 54 Mich. 329 (20 N. W. Rep. 64); *Cummings v. Wyman*, 10 Mass. 464. The rule that an entry by one tenant in common is an entry of all the cotenants has no application where there is an actual ouster of the other cotenants, or some act deemed by law as equivalent thereto. *Beall v. McMenemy*, 63 Neb. 70 (88 N. W. Rep. 134; 93 Am. St. Rep. 427). If one coparcener or tenant in common conveys the entire tract to a stranger, and the stranger takes actual possession claiming the whole, it is an ouster of the other coparceners or tenants in common, and the stranger's possession is adversary to them, and the statute of limitations runs in his favor. *Benness v. Pierce*, 50 W. Va. 604 (40 S. E. Rep. 395). Where persons in possession of land under color and claim of title to the whole interest make partition, and convey the whole interest, maps and conveyances in pursuance of the partition being made and recorded, and the grantee in the partition deed enters, claiming the whole interest, there is an ouster and disseisin of all claiming to be tenants in common with the grantee in such partition deed. *Jellerson v. Pettus*, 132 Ala. 671 (32 So. Rep. 663). Where one of two tenants of a leasehold surrenders possession to the lessor, who places a third party in possession as sole tenant, there is an ouster of the other cotenant, which will authorize an action against him by the lessor. *Hartford v. Taylor*, 181 Mass. 266 (63 N. E. Rep. 902).

Sec. 777. Recovery of rent between tenants in common—Lien therefor. A tenant in common who is entitled to recover from his cotenant damages for waste, under W. Va. Code, ch. 92, § 2, on account of the latter's removal of coal from the premises may waive the tort and require an accounting for money had and received, when the coal has been sold by such tenant. If a tenant in common takes possession of the premises to the exclusion of his cotenant, and leases the same to third parties for the purpose of mining and removing the coal therefrom, at a specified sum per ton, as royalty for the coal so removed, the cotenant so excluded may require an ac-

counting to him for his just proportion of such royalty, as the proper measure of damages for such waste. *Cecil v. Clark*, 49 W. Va. 459 (39 S. E. Rep. 202). The right of tenants in common against their cotenant in possession to have reimbursement for rents received and a lien therefor on his interest, is at best a mere equity and does not take priority over a mortgage executed by him on his interest before such equity is sought to be enforced. *Omohundro v. Elkins*, 109 Tenn. 711 (71 S. W. Rep. 590). The court say: "While it is true that in a partition proceeding those cotenants who have not received their proper share of rents are entitled to an accounting against one of their number who has received more than his share—*Tyner v. Fenner*, 4 Lea, 469-473,—and some of the cases (of which *Hannan v. Osborn*, 4 Faige, 336-343, is an example) base this right upon the theory of an equitable lien as between the tenants in common while they continue to hold the premises in common, still we think the weight of authority, as well as of reason, supports the proposition that, whether this right existing between cotenants be properly designated as a mere equity, enforceable upon the filing of a bill for partition, or as an equitable lien, it can not override a mortgage executed by a cotenant on his undivided interest in the land prior to the filing of the bill for partition. *Burns v. Dreyfus*, 69 Miss. 211 (11 So. Rep. 107; 30 Am. St. Rep. 539); *Clark v. Hershey*, 52 Ark. 473-492 (12 S. W. Rep. 1077); *Brittinum v. Jones*, 56 Ark. 624-627 (20 S. W. Rep. 520); *Burch v. Burch*, 82 Ky. 622; *Newbold v. Smart*, 67 Ala. 326-331; *Houston v. McCluney*, 8 W. Va. 135; *Welch v. Ketchum*, 48 Minn. 241 (51 N. W. Rep. 113); *Stover v. Cory*, 53 Ia. 708 (6 N. W. Rep. 64). Some of these cases deny the existence of any lien whatever, but, if we assume that there is a lien at all, it could not be a creature of equity, and not operative as to third parties until the filing of a bill for partition making claim therefor and seeking its enforcement. Any other view would result in permitting real estate to be incumbered by secret liens, and would greatly embarrass the transfer and disposition of such property. We think the sounder view is that the right to reimbursement in the character of case we have before us is a mere equity that arises upon the filing of the bill for partition, making proper allegation in respect thereof, and making claim therefor."

Sec. 778. Recovery by cotenants for making repairs, or damages for cutting timber. A tenant in common making

repairs on the premises after the death of his cotenant has no claim which he can enforce against the personal estate of the latter. *De Grange v. De Grange*, 96 Md. 609 (54 Atl. Rep. 663). One tenant in common suing for damages for the cutting of timber upon the estate is only entitled to recover a proportion of the entire damage equivalent to the fractional part of the whole estate owned by him. *Winborne v. Elizabeth City Lumber Co.*, 130 N. C. 32 (40 S. E. Rep. 825).

TITLE.

EPITOME OF CASES.

Sec. 779. Construction of contracts in reference to title. In an action by a vendee to recover damages for a breach of his vendor's contract to convey land "free and clear," the plaintiff is required to show that the conveyance tendered by the defendant would not pass a good title. *Meyer v. Madreperia*, 68 N. J. L. 258 (53 Atl. Rep. 477). A contract to perfect by a certain time title to real estate objected to by a purchaser on account of possible outstanding interests not included by a tax sale through which the title is traced, means that the title is to be freed from possible defects, if any, arising from the claims of persons laboring under disabilities, and is not performed by the procuring of a judgment against all unknown claimants which, under the statute, is subject to the grant of new trial on application within two years. *Williams v. Doolittle*, Ia. (88 N. W. Rep. 350).

Sec. 780. Good and marketable title. A title is not unmarketable where no question of fact is involved, and it is good as a matter of law. *Mathews v. Lightner*, 85 Minn. 333 (88 N. W. Rep. 992; 89 Am. St. Rep. 558). A child of a devisee of land for life, although he has a vested interest, can not convey a marketable title during the life of the life tenant, where his interest is subject to being divested in the event of the death of such child during the life of the devisee for life. 1 N. J. Gen. Stat., p. 1195, § 10 construed and applied. *Lamprey v. Whitehead*, 64 N. J. Eq. 408 (54 Atl. Rep. 803). For a

discussion of the effect upon an otherwise good title, of a possible outstanding interest in one presumed to be dead, on account of his having been absent for seven years unheard of, see *Meyer v. Madreperia*, 68 N. J. L. 258 (53 Atl. Rep. 477; 96 Am. St. Rep. 536). Particular title held to be unmarketable. *Barger v. Gery*, 64 N. J. Eq. 263 (53 Atl. Rep. 483).

Sec. 781. Marketability of title dependent upon proof of facts. In discussing the marketability of a title dependent upon proof of facts, the court of chancery of New Jersey, in the case of *Barger v. Gery*, 64 N. J. Eq. 263 (53 Atl. Rep. 483), say: "That titles must be held marketable, although dependent upon the proof of facts, can not be disputed. If this were not so, a vendor holding title as heir or devisee in a large number of cases could not have the remedy of specific performance. But when we come to inquire for rules as to the nature and quantum of evidence necessary to render a title dependent on facts which must be proved by witnesses a marketable title, we find ourselves with comparatively little help from the decided cases. It must be true, from the nature of things, that every case must largely rest upon its own circumstances. We have the general rule that the purchaser has a right to a title which is reasonably safe,—reasonably safe against loss, and reasonably safe against attack. When the authorities speak of the 'hazard of litigation' to which the purchaser must not be subjected, it seems to me that they must refer to a hazard which is to be determined by the chance of successful attack as viewed by the court in the suit for specific performance. When, also, they speak of a 'doubt' or a 'supposed flaw' as affecting the saleability of title, they must refer to the character of the doubt or flaw as the court views it, and not as it may be viewed by the indeterminate judgment of the real estate market. Some purchasers, guided by cautious counsel, will not accept a title against which the slightest possibility of doubt is suggested; and yet there is no title concerning which a possible doubt or the possibility of a future flaw can not be raised. The authorities, I think, establish the rule as a safe one that a title dependent on a fact must be regarded as marketable when (1) the fact is so conclusively proved in the suit for specific performance that a verdict against the existence of the fact would not be allowed to stand in a court of law, and (2) where there is no reasonable ground for apprehending that the same fact can not be in like manner proved, if necessary, at any

time thereafter for the protection of the purchaser. In *Shriver v. Shriver*, 86 N. Y. 575, 584, Chief Justice Folger says: 'A title may be doubtful—which is to say unmarketable—because of the uncertainty of some matter of fact appearing in the course of the deduction of it; and if, after the vendor has produced all the proofs that he can, a rational doubt still remains, a title is not marketable. It seems that a rational doubt may be said to exist when a court of law would not feel called upon to instruct a jury to find that the fact existed on the existence of which the vendor's title depends.' See *Helreigel v. Manning*, 97 N. Y. 56, 60; *Moser v. Cochrane*, 107 N. Y. 35 (13 N. E. Rep. 442); *Ferry v. Sampson*, 112 N. Y. 415 (20 N. E. Rep. 387). In *Ferry v. Sampson*, *supra*, the New York court of appeals declared that: 'If the existence of the alleged fact which is supposed to cloud the title is a possibility merely, or the alleged outstanding right is a very improbable and remote contingency, which, according to the ordinary experience, has no probable basis, the court may compel the purchaser in such a case to complete his purchase.' In *Vought v. Williams*, 120 N. Y. 253, 258 (24 N. E. Rep. 195; 8 L. R. A. 591; 17 Am. St. Rep. 634), the above-quoted statement was repeated by the same court, although held inapplicable to the case then before the court. The English rule stated by Prof. Pomeroy (Spec. Perf. § 205) takes special account of any presumption favorable to the title, and apparently takes no account of the availability of the evidence produced in favor of the title for the future protection of the purchaser in a subsequent litigation between the purchaser and a third party; thus ignoring the class of cases to which *Fahy v. Cavanaugh*, 59 N. J. Eq. 278, 283 (44 Atl. Rep. 154), belongs."

Sec. 782. Doubt in vendor's title which will preclude specific performance. In discussing what doubt in a vendor's title will preclude his enforcing specific performance, the court of chancery of New Jersey, in the case of *Richards v. Knight*, 64 N. J. Eq. 196 (53 Atl. Rep. 452), say: "The single object of this bill is to compel the defendant to accept a conveyance of the farm in question, in performance of his contract to buy it. This court will not decree specific performance if there be, as to questions of fact, such doubt as to the complainant's ability to convey a good title that the purchaser, if compelled to perform, would be subjected to the hazard of litigation. *Lippincott v. Wikoff*, 54 N. J. Eq. 114 (33 Atl. Rep.

305). If the doubt raised depends only upon a question involving the application of general principles of law, it is the practice of courts of equity to decide the point of law in the suit for specific performance. In such cases the doctrine is that specific performance should not be decreed if there is reasonable ground for saying that the question is not settled by previous decisions, or if there are dicta of weight which indicate that courts might differ as to the determination of the point involved. *Lippincott v. Wikoff*, 54 N. J. Eq. 114, 120 (33 Atl. Rep. 305, 310). One of the categories in which the courts decline to compel specific performance is where the doubt as to the vendor's power to convey a good title arises in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument." See opinion in principal case for application of these general principles to particular facts.

Sec. 783. Rescission of contract for exchange of lands on account of inability of one party to convey a "good record title." Equity may decree a rescission of a contract for the exchange of lands, in which the parties have agreed to convey a good record title, where one party is able to convey a record title to only a part of his land, he holding title to the balance by adverse possession. *Zunker v. Kuehn*, 113 Wis. 421 (88 N. W. Rep. 605). The court say: "The court found the parties agreed to an exchange of lands, and that each was to give the other a good record title to the tract he was to convey. The defendants claimed to own a tract with a street frontage of 110 feet. The deed given plaintiff only covered a strip 99 feet wide. The defendants had no record title to any more land than they conveyed, and were therefore unable to comply with their agreement. This fact operated as a legal fraud upon plaintiff, and was held sufficient to entitle him to a rescission of the transaction. No serious controversy arises over the facts. It is not claimed that defendants had any record title to the strip 11 feet in width which was not included in their deed. They insist, however, that they had title by adverse possession, and, having offered to convey, no rescission should be decreed. While the evidence is not perfectly clear and satisfactory, it may be admitted that defendants showed adverse possession of over 20 years. This was not a title of record. It depended upon questions of fact, and could only be established by a resort to parol evidence. Nothing that could be adjudicated in this action would be binding upon the holder of the

record title. If plaintiff was to accept a deed from defendants, he might still be obliged to litigate with the holders of the record title the question of title as against them. This court can not anticipate what the defendants or the owners of the record title may be able to prove in such a contest. The latter may be able to prove facts tending to show that what appeared to be adverse possession in a litigation in which he was not heard is quite otherwise. Such possession may be shown to have been permissive, or not continuous, or the attacking party may be one against whom the statute has not run. The situation in such cases is so uncertain, and the inability to make a binding adjudication so apparent, that courts uniformly refuse to compel grantees to accept title where resort to parol evidence is necessary to establish it, or where there is a reasonable doubt concerning its validity. The following are cases where this question has been involved and discussed: *Sims v. McElroy*, 160 N. Y. 156 (54 N. E. Rep. 674; 73 Am. St. Rep. 673); *Brokaw v. Duffy*, 165 N. Y. 391, 399 (59 N. E. Rep. 196); *Heller v. Cohen*, 154 N. Y. 299 (48 N. E. Rep. 527); *Swayne v. Lyon*, 67 Pa. 436; *Holmes v. Woods*, 168 Pa. 530 (32 Atl. Rep. 54); *In re Reighard's Estate*, 192 Pa. 108 (43 Atl. Rep. 413); *Moore v. Williams* 115 N. Y. 586 (22 N. E. Rep. 233; 5 L. R. A. 654; 12 Am. St. Rep. 844); *Allen v. Atkinson*, 21 Mich. 351; *Jeffries v. Jeffries*, 117 Mass. 184. In *Noyes v. Johnson*, 139 Mass. 436 (31 N. E. Rep. 767), it was held that a purchaser was entitled to a good record title, and was not obliged to accept a title by adverse possession. In *Dobbs v. Norcross*, 24 N. J. Eq. 327, it is said: "The court will never compel a purchaser to take a title where the point on which it depends is too doubtful to be settled without litigation, or where the purchase would expose him to the hazard of such proceeding." Many other cases might be cited, but those mentioned cover the precise ground stated, and there are none to the contrary."

Sec. 784. Proof of title. Objection being made, the testimony of a witness that he is the owner of land is incompetent, where the title to the land is in dispute. *Benson v. Files*, 70 Ark. 423 (68 S. W. Rep. 493). In order to establish title through a lost deed proof of its execution and delivery and the contents thereof must be established by clear and satisfactory evidence. *McManus v. Commow*, 10 N. Dak. 340 (87 N. W. Rep. 8). One who relies upon a lost deed to sustain his title to

real estate must establish its original existence, its loss, and the material parts thereof, by clear and convincing evidence. *Garland v. Foster County State Bank*, 11 N. Dak. 374 (92 N. W. Rep. 452). Citing, *Land Co. v. Denny*, 108 Ala. 553 (18 So. Rep. 561); *Loftin v. Loftin*, 96 N. C. 94 (1 S. E. Rep. 837); *Fries v. Griffin*, 35 Fla. 212 (17 So. Rep. 66).

Sec. 785. Slander of title. The grantor in an absolute deed made as security for a loan with whom the grantee has made a parol agreement to reconvey the property upon repayment of the loan, which contract is within the statute of frauds, can not maintain an action for slander of title against the grantee for saying that he, the grantor, has no title to the property. *Hurley v. Donovan*, 182 Mass. 64 (64 N. E. Rep. 685). A petition in an action for slander of title which alleged that defendants did "represent and state in the presence and hearing of certain persons" that the plaintiff was not the owner of certain property described in the petition, etc., was held on demurrer to be equivalent to alleging that the defendant spoke the language charged. In such an action, the plaintiff is entitled, on a proper showing, to a judgment for at least nominal damages, even though no substantial damages appear. *Butts v. Long*, 94 Mo. App. 687 (68 S. W. Rep. 754).

TREES.

EPITOME OF CASES.

Sec. 786. Contracts and conveyances concerning timber and trees. A parol sale of growing trees is clearly within the statute of frauds, when treated as a sale of an interest in the realty, and, treated as a mere license, is revocable as to all trees not cut. *Garner v. Mahoney*, 115 Ia. 356 (88 N. W. Rep. 828). Standing timber is a part of realty, within the meaning of Ky. Stat., § 470, subds. 6, 7, so as to require a contract for the sale thereof, not made in contemplation of immediate separation, to be in writing. *Wiggons v. Jackson*, (Ky.) 73 S. W. Rep. 779 (24 Ky. Law Rep. 2189). Standing timber is of the nature of real estate, and there is no implied warranty in a sale thereof. *Zimmerman v. Lynch*, 130 N. C. 61 (40 S. E. Rep. 841). A description in a contract for the sale

of timber, of the timber sold, as "all the merchantable yellow poplar, ash and cucumber trees or logs owned by us on the south side of Linefork creek and on the north side of Pine Mountain in Letcher county, Kentucky," was held sufficient. *Hays v. McLin*, Ky. (72 S. W. Rep. 339; 24 Ky. Law Rep. 1827). A grantee in a deed conveying to him "all and all manner of timber, down and standing, except hemlock timber," who has cut and removed all trees fit for timber, has no right to afterward cut trees for chemical and pulp purposes where no chemical factories had been erected in the county until he had fully exercised his rights under the deed. *Kaul v. Weed*, 203 Pa. St. 586 (53 Atl. Rep. 489). A vendee of standing timber, under a contract making no stipulation as to time of removal, has a reasonable, but not an unlimited, time in which to remove such timber. *Carson v. Three States Lumber Co.*, 108 Tenn. 681 (69 S. W. Rep. 320). See opinion for discussion of this subject, and particular time held not to be reasonable. Where the contract for the sale of standing timber makes no provision as to when the same shall be cut and removed, it will be treated as real estate of the vendee. *Dils v. Hatcher*, (Ky.) 69 S. W. Rep. 1092 (24 Ky. Law Rep. 826). This case is followed in the case of *Hogg v. Frazier*, (Ky.) 70 S. W. Rep. 291 (24 Ky. Law Rep. 930), in which the court say: "The law is well settled in this state that the title to standing timber in the hands of a purchaser under a written contract, indicating no specific time for their removal, passes in the same way as the land itself, and that the covenant of title would run with the land into the hands of any subsequent vendee with either actual or constructive notice thereof."

Sec. 787. Reservation of timber. A reservation by a grantor in a deed, of "all pine and hemlock timber," includes only trees then fit for the manufacture of timber, to be removed within a reasonable time; but the grantor's title to such timber is not forfeited to the grantee by failure to remove until after he has had notice to remove and a reasonable time to comply. *Huron Land Co. v. Davison*, 131 Mich. 86 (90 N. W. Rep. 1034). The cutting, within the time limit, of timber reserved in a conveyance of land with right of entry for purpose of cutting and removing same "at any and all times for a period of five years from the date of the deed," converts it into personal property and vests the title in one claiming under the reservation, which title is not lost by failure to remove the cut

timber within the five-year period. *Erschine v. Savage*, 96 Me. 57 (51 Atl. Rep. 242).

Sec. 788. Title of purchaser of timber. Purchasers of timber on land against which there exists an overdue recorded mortgage take subject to the rights of the mortgagee to the timber. *Jeffers v. Pease*, 74 Vt. 215 (52 Atl. Rep. 422). A purchaser of standing timber, whose good faith is otherwise established, will not be held to have been in bad faith simply because the records showed that the seller did not have title to the land. *Guarantee Trust & Safe Rep. Co. v. E. C. Drew Inv. Co.*, 107 La. 745 (31 So. Rep. 736).

Sec. 789. Actions for injuries to or removal of trees—Measure of damages. An action brought under Conn. Gen. Stat. 1888, § 1345, for the wrongful destruction of trees is not for the recovery of a forfeiture so as to be barred in one year, under § 1379; nor is the plaintiff's right to recover defeated by a finding that the trees cut were of greater value than that alleged. *Plumb v. Griffin*, 74 Conn. 132 (50 Atl. Rep. 1). Ala. Code, § 4137 construed and applied—recovery of penalty for cutting timber. *Jernigan v. Clark*, 134 Ala. 348 (32 So. Rep. 686). Bal. Ann. Wash. Codes & Stat., §§ 5656, 5657 construed and applied—recovery of treble damages for cutting of trees without authority. *Gardner v. Lovegren*, 27 Wash. 356 (67 Pac. Rep. 615). The measure of damages for the removal of timber by one who, in good faith, supposed he had a right to remove it, is the value of the timber standing at the time of the conversion. *Chappel v. Puget Sound Reduction Co.*, 27 Wash. 63 (67 Pac. Rep. 391; 91 Am. St. Rep. 820). In trover for timber cut by a trespasser in good faith under belief of title, the measure of damages is the value at the time of conversion, less the amount added to its value. *Anderson v. Besser*, 131 Mich. 481 (91 N. W. Rep. 737). In Louisiana it is held that where a partnership advisedly sells the timber of a third person to an innocent purchaser, who cuts down the timber and takes it to market and sells it, both the partnership and the purchaser are trespassers, and are solidarily liable in damages to the owner of the timber; but in fixing the amount of the damages decreed to be paid by the parties a different basis will be adopted. As to the innocent purchaser the basis will be the value of the timber at the stump; as to the firm, held as a trespasser in bad faith, the basis will be the value of the timber after reaching

market. *Guarantee Trust & Safe Dep. Co. v. E. C. Drew Inv. Co.*, 107 La. 745 (31 So. Rep. 736). See, as to measure of damages for the wrongful cutting of timber, *Holt & Johnson v. Hayes*, 110 Tenn. 42 (73 S. W. Rep. 111).

TRESPASS.

HERSEY V. HUTCHINS.

(71 N. H. 458.)

Right of successful plaintiff in ejectment to recover in trespass the costs and expenses of the ejectment suit—Recovery of expenditures for attorneys, surveyors, etc. The common-law right of a successful plaintiff to maintain trespass against the defendant for mesne profits and recover as damages the costs of the ejectment as well as the mesne profits, does not also authorize a recovery of his expenditures for attorneys, surveyors and others in the ejectment suit.

Sec. 790. Statement of the case. Action by Nellie M. Hersey against Frank Hutchins. At a prior term the plaintiff recovered judgment upon the verdict of a jury against the defendant for the possession of the locus in quo and for her taxable costs in a writ of entry. The taxable costs were paid by the defendant. The question whether the plaintiff is entitled, as a part of her damages in the present action, to sums of money paid by her to attorneys, surveyors, and others in the prior action was transferred from the March term, 1902, of the superior court.

CHASE J.

Sec. 791. Right of successful plaintiff in ejectment to recover in trespass the costs and expenses of the ejectment suit—Common-law rule. The plaintiff relies largely upon *Fowler v. Owen*, 68 N. H. 270 (39 Atl. Rep. 329; 73 Am. St. Rep. 588), for a decision in her favor. In that case the question of title to the land in suit was tried and decided in favor of the plaintiff in an earlier action of trespass. The defendant retaining the possession of the premises by a tenant notwith-

standing the judgment, the plaintiff filed a bill in equity against the defendant and his tenant, and obtained a decree enjoining them to surrender the premises forthwith, and ordering the issue of a writ of possession. The defendants did not obey the injunction, and the writ of possession proved ineffectual, and thereupon they were proceeded against for contempt, and were found guilty. As a result of the proceedings, the plaintiff got possession. In the case reported it was ruled that the plaintiff was entitled to recover the expenses necessarily incurred and actually paid by him in the equity suit and the proceeding for violating the injunction. This was the ruling to which the decision related. It will be noted that the ruling did not include the expenses incurred and paid by the plaintiff in the action in which the title to the premises was in dispute, but only the expenses that were necessarily incurred to regain possession after it had been adjudged that the plaintiff's title was valid. The defendant apparently attempted to hold the premises in defiance of the plaintiff's adjudged right. There was no excuse for his acts, and the natural tendency of them was to induce the plaintiff to take further steps to regain the possession to which he had been adjudged entitled. The expenses necessarily incurred in beginning, and prosecuting the suit in equity and its incident, were natural and direct consequences of the defendant's wrongful acts, as much so as would be the expenses incurred in removing an inert object placed or suffered to remain upon the land by the defendant. In the present case the expenses for which the plaintiff seeks reimbursement were incurred in establishing her title to the premises, the same as were those incurred by the plaintiff in *Fowler v. Owen*, 68 N. H. 270 (39 Atl. Rep. 329; 73 Am. St. Rep. 588), in the first action of trespass. The question before the court therefore, differs materially from the question decided in that case, and requires independent consideration.

By the common law the successful plaintiff in an action of ejectment could subsequently maintain an action of trespass for mesne profits, etc., and recover as damages the costs of the ejectment as well as the mesne profits; and this, whether the action of ejectment was brought in the name of a fictitious lessee against a casual ejector, as was the early practice, or by the real owner against the real disseisor, as was the later practice, and whether the defendant appeared and defended or was defaulted. *Aslin v. Parkin*, 2 Burr. 665; *Goodtitle v. Tombs*, 3 Wils. 118; *Gulliver v. Drinkwater*, 2 Term R. 261; *Doe v.*

Davis, 1 Esp. 358; Brooke v. Bridges, 7 Moore, 471; Symonds v. Page, 1 Crompt. & J. 29; Doe v. Hare, 2 Dowl. 245; Doe v. Filliter, 13 Mees. & W. 47; Pearse v. Coaker, L. R. 4 Exch. 92.

Generally, the court directed the costs to be taxed when awarded in the action. This was done by an officer of the court known as "taxing master." The fee bill was not definite in all particulars, and the taxing master was intrusted with considerable discretion. It seems that he had authority to allow charges for the services of counsel in giving advice, drawing pleadings, settling affidavits, etc. 3 Enc. Laws Eng. 468, 469; 12 Enc. Laws Eng. 77; 3 Bl. Comm. 399. When the costs in the action of ejectment were taxed therein, the plaintiff was not entitled to a larger sum as part of his damages in the action for mesne profits; but if there was no authority for taxing them in the ejectment suit, or if for any reason they were not taxed, the plaintiff was entitled to have them allowed by the jury upon evidence submitted to them. In the latter case, the taxation was according to a more liberal scale than in the former. Doe v. Davis, 1 Esp. 358; Brooke v. Bridges, 7 Moore, 471; Symonds v. Page, 1 Crompt. & J. 29; Doe v. Huddart, 2 Crompt. M. & R. 316; Nowell v. Roake, 7 Barn. & C. 404. In Doe v. Huddart, the judge charged the jury that the party driven to bring an action of ejectment was entitled to recover the necessary expenses he was put to in the assertion of his right, and the jury assessed more than would be taxed by a master. The defendant, although excepting at first, "gave up" the point, and it was not decided. It is said that there was no practice by which the court officers taxed costs against the casual ejector, and consequently they were necessarily taxed by the jury in that case. See remark of Alderson, B., in Doe v. Filliter, 13 Mees. & W. 47, 48. In Nowell v. Roake, 7 Barn. & C. 404, the plaintiff recovered judgment in an action of ejectment upon a writ of error, and it was held that, as the court of error could not award costs, he was entitled to recover the expenses incurred in that court as part of his damages in the action for mesne profits, and that "the jury might reasonably consider the costs between attorney and client as the measure of the damages which he had sustained." In Doe v. Filliter, 13 Mees. & W. 47, the plaintiff's costs in the ejectment suit had been taxed under the judge's order, and had been paid into court, and it was held that he could not recover more. Rolfe, B., said: "Here a taxation has taken place in the usual way, and by that the plaintiff is bound.

When, indeed, there has been no taxation *ex necessitate*, the jury must say what is to be an indemnity." Pollock, C. B., assigns as a reason for the decision that "the plaintiff is not entitled to be in a better situation than any other plaintiff."

Sec. 792. Right of successful plaintiff in ejectment to recover in trespass the costs and expenses of the ejectment suit—Recovery of expenditures for attorneys, surveyors, etc.—American cases reviewed. The American authorities on the subject are not uniform, but the cases in which it is held that only the taxable costs of the ejectment suit can be recovered as a part of the damages in the action for mesne profits outweigh those in which counsel fees and other expenses were allowed. Only two cases of the latter class have been found,—*Denn v. Chubb*, 1 Cox 466 and *Trustees of Augusta v. Perkins* 8 B. Mon. 198. *Denn v. Chubb* was a *nisi prius* decision made in 1795, and it was overruled in the recent case of *Pike v. Daly*, 54 N. J. L. 4 (23 Atl. Rep. 7). In *Trustees of Augusta v. Perkins*, 8 B. Mon. 198, it is held that the plaintiff is entitled to be reimbursed in such amount as he has in good faith been compelled to pay in obtaining by legal means the restoration of the property which the defendant has wrongfully taken or withheld from him. No authority is cited, and the decision is put solely upon the principle by which, in an action of trespass for taking a horse, the plaintiff may recover whatever sum the wrongdoer has exacted from him as the price of a redelivery. The court recognize the English rule that when costs have been taxed the taxation is a final liquidation, and a larger sum can not be recovered in the action for mesne profits; but they say it does not apply in Kentucky, where a strict rule for the taxation of costs is prescribed, because, "if it did, it would exclude a recovery beyond the strict charges for legal costs."

The cases in which it is held that the counsel fees and other expenses should not be included in the damages are *White v. Clack*, 2 Swan, 230; *Meloy v. Johnston*, 2 McArthur, 202; *Alexander v. Herr's Ex'rs*, 11 Pa. 537; *Stopp v. Smith*, 71 Pa. 285; *Herreshoff v. Tripp*, 15 R. I. 92 (23 Atl. Rep. 104); *Pike v. Daly*, 54 N. J. L. 4 (23 Atl. Rep. 7). The reasons given for this holding are that costs are awarded to the successful party in an action to indemnify him for the expenses incurred in establishing his right, and although they are not full indemnity they are all that the law allows; that

they become liquidated and a debt when the judgment is rendered, and it is contrary to principle to allow them to be recovered a second time as a part of the damages in another action; and that the plaintiff in ejectment is in the same situation in this respect as other suitors who sue for their rights, and has no just claim to fuller indemnity. If the successful plaintiff in ejectment is entitled to fuller indemnity than is afforded by the taxable costs in the action, the significant inquiry is made why the defendant if successful should not have indemnity to the same extent? It is believed that these reasons can not be successfully answered. The principle upon which the decision in *Trustees of Augusta v. Perkins*, 8 B. Mon. 198, was made is not adequate for the purpose. If the plaintiff in an action of trespass for taking a horse was entitled to be fully indemnified for the expenses incurred by him in instituting and prosecuting the action, as well as for the money exacted from him by the wrongdoer as the price for a redelivery of the horse, the principle would perhaps justify the decision; but it was not claimed that the plaintiff could recover such expenses. Neither does the fact that an adoption of the English rule would exclude a recovery beyond the legal costs allowed by the Kentucky rule seem to be a sufficient reason for not applying the English rule.

In this state the action commenced by writ of entry takes the place of the action of ejectment. *Withington v. Corey*, 2 N. H. 115; *Winkley v. Hill*, 6 N. H. 391; *Bailey v. Hastings*, 15 N. H. 525; *Hatch v. Partridge*, 35 N. H. 148, 157. Costs follow the event of every action unless otherwise directed by law or the court. Pub. Stat., ch. 229, § 1. They are fixed by the fee bill as to most matters. *Id.*, ch. 287. Generally they are much less than the expenses necessarily incurred by the party in whose favor they are awarded. It is not the policy of the law that reimbursement in full should be made for such expenses; if it were, the statutes would provide for reimbursement instead of limiting costs to small fees. No distinctions are made between actions on account of their form or nature, or the merits of the claims of the respective parties therein. The same provisions apply whether the action be entry, trespass, case, or assumpsit, and whether the unsuccessful party had reasonable grounds for his contention or not. The plaintiff in an action for malicious prosecution can recover as costs in the action no more than the costs prescribed

for actions generally, however unreasonable and malicious the defendant's acts may have been.

So far as appears, the title to the locus in this action may have been in dispute in the prior action; each party may have asserted title to it in good faith; but if the defendant showed no title, and made no pretense of a title, the only costs that could be adjudged against him in the action would be the taxable costs, the same as would be recovered if he set up a title in good faith, which failed only because of a slight preponderance in the weight of the testimony supporting the plaintiff's title. In justice and equity the plaintiff is not entitled in this action to fuller indemnity for the necessary expenses incurred by her in the former action than she would be entitled to if this action had not been brought. The bringing of this action did not render the plaintiff's claim of indemnity any more just or equitable. Besides, the claim, to the extent which the law will allow it, was liquidated, and became a part of the judgment in the entry suit. Elementary principles of law would be violated if the plaintiff were allowed to bring it forward again in this action and have it considered as if there was no judgment upon it.

There is nothing in the reserved case to show that the plaintiff is entitled to have the sum paid by her to surveyors and others in the prior action included as a part of her damages in this action.

Case discharged. All concurred.

EPITOME OF CASES.

Sec. 793. What constitutes trespass. A peaceable entry upon land by one having title thereto can not be regarded as a trespass. *Vetterly v. McNeal*, 129 Mich. 507 (89 N. W. Rep. 441). One may be guilty of trespass by extending his arm onto the premises of an adjoining owner, although his body remains on his own land; but it is not trespass for one of such owners to hang his property on a division fence between them erected entirely by the other owner. *Hannabalsen v. Sessions*, 116 Ia. 457 (90 N. W. Rep. 93; 93 Am. St. Rep. 250. See pp. 254-261 for exhaustive note on "Expulsion of trespasser"). One who without right enters upon the property of an adjoining owner and builds upon a wall thereon will be treated as a trespasser and be compelled to remove his

structures, although the owner knew of their erection at the time and made no objection. *Bright v. Allen*, 203 Pa. St. 394 (53 Atl. Rep. 251; 93 Am. St. Rep. 769). The action of a town surveyor in unlawfully taking the land of an individual and throwing it open for public travel does not put the town in possession thereof so as to render it liable for his trespass. *Briggs v. Allen*, 24 R. I. 80 (52 Atl. Rep. 679). A state license to hunt does not confer any right upon the holder thereof to go upon lands owned by private parties without their permission. *Diana Shooting Club v. Lamoreaux*, 114 Wis. 44 (89 N. W. Rep. 880; 91 Am. St. Rep. 898). Where the construction, maintenance and operation by a city of a system of driven wells and pumping station, used to create a public water supply, results in drying up the streams, brooks, ditches, pools and wells on an adjoining farm, used for the growing of crops and vegetables for the city market, so as to greatly impair its usefulness for these purposes, the owner of the farm may recover damages for the trespass; and evidence showing the extent of the business which has been interrupted and the value of the farm to him is admissible. *Reisert v. City of New York*, 174 N. Y. 196 (66 N. E. Rep. 731). See opinion for discussion of this subject. Under Ga. Penal Code, § 220, a tenant placed in possession of land by the owner is authorized to forbid a trespass upon the land by another. *Bryce v. State*, 113 Ga. 705 (39 S. E. Rep. 282). Vt. Stat., § 4626 construed and applied—trespass on inclosed lands—what constitutes “inclosed” lands. *Payne v. Gould*, 74 Vt. 208 (52 Atl. Rep. 421).

Sec. 794. What constitutes trespass—Retaking of personal property—Execution of judicial process. Where a contract for the sale of personal property provides that the vendor may enter upon the premises of the vendee for the purpose of removing such property in the event it is not paid for, an entry in pursuance of such provision is not trespass. *C. F. Adams Co. v. Sanders*, (Ky.) 66 S. W. Rep. 815 (23 Ky. Law Rep. 1975). The forcible entry of a lodging house made over the protest of its keeper for the purpose of seizing property of a lodger under a writ of replevin will constitute trespass. *Gusdorf v. Duncan*, 94 Me. 160 (50 Atl. Rep. 574). The execution of a writ of assistance obtained by a purchaser at a foreclosure sale under a power, on a judgment in ejectment in his favor against the mortgagor, is not a trespass against

the latter's wife who joined in the mortgage for the purpose of relinquishing her right of dower and claim to homestead, although she claimed that after giving the mortgage she received a deed for an interest in the property from a third person, but failed to assert this claim by intervening in the action of ejectment. *Burns v. Womble*, 131 N. C. 173 (42 S. E. Rep. 573).

Sec. 795. Trespassing animals. To the extent Ariz. Laws 1893, p. 32, act. No. 41, concerning the impoundment of animals running at large, authorizes a sale of such animals by the poundmaster to satisfy the private claim of the landowner, without any judicial proceedings to ascertain either the amount of the damages or whether the animal was in fact running at large within the meaning of the act, it is unconstitutional. *Greer v. Downey*, Ariz. (71 Pac. Rep. 900). See opinion for discussion of this subject. One grazing his cattle on public lands, who, with knowledge that another has purchased all the odd-numbered sections in the vicinity, and without trying to ascertain the boundaries of such sections, drives his cattle indiscriminately on lands in such vicinity, is guilty of trespass, although the odd-numbered sections were not plainly distinguishable from the others by artificial markings. See opinion for decision of numerous questions as to admissibility of evidence and applicability of instructions in action for trespass by animals. *Cosgriff v. Miller*, 10 Wyo. 190 (68 Pac. Rep. 206). *Ida. Rev. Stat.*, §§ 1210, 1211, prohibiting grazing and herding of sheep within two miles of inhabited dwellings, is held constitutional as a valid exercise of the police powers of the state; but under this statute the owner or herder of sheep is only liable for the damages which are caused, in the commission of the trespass by his own sheep. In estimating the damages caused to a settler by herding and grazing sheep within two miles of his dwelling, and on the public lands, the number of live stock which he has depending on pasturage upon said lands must be taken into consideration. *Sweet v. Ballentine*, *Ida.* (69 Pac. Rep. 995). A landowner is not rendered liable for injuries to animals lawfully at large coming upon his land, caused by the existence of dangerous agencies thereon, but not wantonly or intentionally caused, on account of a statute (*Mont. Pol. Code*, § 3258) and a custom of the state making the maintenance of a legal fence by a landowner a prerequisite to his

recovering damages for trespass by animals. *Beinhorn v. Griswold*, 27 Mont. 97 (69 Pac. Rep. 557; 59 L. R. A. 771; 94 Am. St. Rep. 818). An action will not lie in Nebraska for damages done by domestic animals ranging at large upon uncultivated land; but a petition which states that defendant, with his cattle, broke and entered upon plaintiff's premises, and injured and destroyed property thereon, charges a willful trespass, and is good against a general demurrer. *Meyers v. Menter*, 63 Neb. 427 (88 N. W. Rep. 662).

Sec. 796. Who may maintain an action for trespass—

Title or interest necessary. Actual possession in the plaintiff is sufficient to maintain trespass against a wrongdoer without title. *Hall v. Deaton*, (Ky.) 68 S. W. Rep. 672 (24 Ky. Law Rep. 314); *Crate v. Strong*, (Ky.) 69 S. W. Rep. 957 (24 Ky. Law Rep. 710). One having the right to possession of real estate is entitled to invoke the remedies provided by law against a trespasser thereon. *Olson v. City of Seattle*, 30 Wash. 687 (71 Pac. Rep. 201). The wife alone can not maintain trespass affecting lands held by entireties which are in the possession of both herself and husband. *Fowles v. Hayden*, 130 Mich. 47 (89 N. W. Rep. 571). An action may be maintained by a homestead entryman in possession against a subsequent trespasser to recover damages in cropping the land. It is immaterial that the possession of the trespasser commenced prior to the issuing of the homestead entry, if such possession was not acquired and continued by virtue of any individual right of entry. *Mathews v. O'Brien*, 84 Minn. 505 (88 N. W. Rep. 12). One having title to land of which he is not in possession and of which he has not previously been in possession, but which is occupied by a wall belonging to another, by entering and tearing down the wall acquires the necessary possession to sue for the continuing trespass of maintaining the wall. *Percival v. Chase*, 182 Mass. 371 (65 N. E. Rep. 800). Under the common law neither the heir or executor or administrator of a decedent could sue at law to recover damages for trespass on the lands of the decedent during his lifetime; and Miss. Code, 1892, §§ 1916, 1917, changes this rule only as to executors and administrators. *Conklin v. Alabama & V. Ry. Co.*, 81 Miss. 152 (32 So. Rep. 920). In support of the first proposition, the court cite, *Broom*, Leg. Max. top page 911; *Plowd.* 142; 2 Saund. Pl. & Ev. 868; 2 Mod. 7; 1 Saund. 216, note; 217, note; Barb. Par-

ties, 176; *Wilbur v. Gilmore*, 21 Pick. 252; *Reed v. Railroad Co.*, 18 Ill. 403. Particular evidence held insufficient to show a sufficient constructive possession to maintain the action. *Rice v. Chase*, 74 Vt. 362 (52 Atl. Rep. 967).

Sec. 797. Practice in action for trespass—Miscellaneous notes. In an action for damages for obstructing a private way, to entitle plaintiff to prove special damages for loss of business and custom the causes of the loss must be specially set out, and the particular loss alleged. *Fleming v. Baltimore & O. R. Co.*, 51 W. Va. 54 (41 S. E. Rep. 168). In an action of trespass *quare clausum* brought by one against the servants of a village concerning land used by it, they are not concluded from showing plaintiff's entry to have been wrongful by the fact that the village tax collector had assessed taxes against the premises in the plaintiff's name and received them from him. *Moore v. Pear*, 129 Mich. 513 (89 N. W. Rep. 347). An owner of a 60-acre tract of land who brings an action to recover damages for subsidence of the surface on account of improper mining, and limits his claim to 29 acres of the tract, may maintain a subsequent action for a like injury to the remainder of the tract, where the injury to such remainder began after the institution of the first suit, though there had been no mining after such time. *Pantall v. Rochester & P. Coal & Iron Co.*, 204 Pa. St. 158 (53 Atl. Rep. 751). It is error to direct a verdict for plaintiff where his right to maintain the action rests upon an agreement fixing boundaries, and there is evidence showing that such an agreement was procured by him by fraud. *Perry v. Hardy*, 71 N. H. 151 (51 Atl. Rep. 644). The defendant may show title or an entry under a license. A foreign deed under which he claims title is admissible in mitigation of damages, although defective in not having the seal of the probating notary, and a certificate of a court of record that the notary was authorized to do said acts. *Turner v. Poston*, 63 S. C. 244 (41 S. E. Rep. 296). A statute (Pa. Pub. Laws 1876, p. 95) authorizing the recovery by plaintiff in an action for trespass, on filing notice thereof, of damages down to the day of trial, where the trespass is a continuing one, can not be used to bring in a subsequent cause of action arising between the issue of the writ and the trial, though the trespass is of the same character as that alleged in the first action. *Pantall v. Rochester & P. Coal & Iron Co.*, 204 Pa. St. 158 (53 Atl. Rep. 751). Ky. Stat., § 2361 con-

strued and applied—action by owner not in possession. *Wiggins v. Jackson*, (Ky.) 73 S. W. Rep. 779 (24 Ky. Law Rep. 2189). Mich. Comp. Laws, § 10,217 construed and applied—jurisdiction of action of trespass on lands—change of venue. *Freud v. Rohnert*, 131 Mich. 606 (92 N. W. Rep. 109).

Sec. 798. Liability of trespassers for frightening occupant of a house.—A woman who has been so frightened as to produce nervous prostration by the acts of a trespasser stealthfully entering in the nighttime a house belonging to her husband and occupied as their home, may recover damages therefor. *Watson v. Dilts*, 116 Ia. 249 (89 N. W. Rep. 1068; 93 Am. St. Rep. 239). The court say: "Many cases have been before the courts in which the question of a recovery for mental pain alone, and for physical disability produced by fright, unaccompanied by physical impact, have been decided and the decisions on these questions are in conflict, though it is probably true that the numerical weight of authority denies the right of action. But the cases so holding are not in harmony as to the reasons given for denying the right of action: some of them hold that the injury is not the proximate result of the alleged negligent or wrongful act, while others refuse a recovery for the reason that it is practically impossible to satisfactorily administer any other rule and serve the purposes of justice. The latter rule is the one adopted in Massachusetts. *Spade v. Railroad Co.* 168 Mass. 285 (47 N. E. Rep. 88; 38 L. R. A. 512; 60 Am. St. Rep. 393) We shall not take the time to review the cases in detail which hold to the doctrine that no recovery can be had. A large majority of them are cases in which the simple charge of negligence was made, and in many of them no claim was made for physical disability resulting from the fright. A review of some of the cases will be found in *Braun v. Craven*, 175 Ill. 401 (51 N. E. Rep. 657; 42 L. R. A. 199); See, also, note in *Ewing v. Railway Co.*, 147 Pa. 40 (23 Atl. Rep. 340; 14 L. R. A. 666; 30 Am. St. Rep. 709). Our attention has not, however, been called to any case in which the facts averred are precisely parallel to the facts in this case, and in no case to which we have been cited, and in no case which our own investigation has discovered, have we found facts alleged which so strongly condemn the unlimited application of the rule contended for by the appellee as do the facts pleaded in the case at bar. This defendant, in the nighttime, stealthily and unbidden invaded the home of the plain-

tiff and her husband and family. When he entered the house and went to an upper room, she did not know who it was, nor his purpose and intent in thus breaking and entering their home. It was an unlawful and lawless trespass on his part, no matter whether he entered with the intent to steal the personal property of the inmates of the house or whether he was in quest of other game. Nor does it matter, in our judgment, that the trespass was committed on property belonging to the husband. It was her home as well as that of her husband; her right to its peaceful and quiet enjoyment day or night was equal to that of her husband; and any unlawful entry or invasion thereof which produced physical injury to her was a wrong for which she ought to recover. Let us go a little further with the case, and suppose that his purpose had been to ransack the house, and steal therefrom; that he went in masked, and with a deadly weapon in his hand. His discovery there under such circumstances might well cause alarm to the boldest man, and, if it produced nervous prostration and physical disability, the theory, no matter what its reason, that would say there was no actionable wrong, would be too fine spun and too cold for our sanction. Nor could it be said, under such circumstances, that the prostration resulting from the fright so caused was not the proximate or probable result of the defendant's act. 'Proximate cause is probable cause; and the proximate consequence of a given act or omission, as distinguished from a remote consequence, is one which succeeds naturally in the ordinary course of things, and which, therefore, ought to have been anticipated by the wrongdoer.' 1 Thomp. Neg. 156. It is within the common observation of all that fright may, and usually does, affect the nervous system, which is a distinctive part of the physical system, and controls the health to a very great extent, and that an entirely sound body is never found with a diseased nervous organization; consequently one who voluntarily causes a diseased condition of the latter must anticipate the consequence which follows it. The nerves being, as a matter of fact, a part of the physical system, if they are affected by fright to such an extent as to cause physical pain, it seems to us that the injury resulting therefrom is the direct result of the act producing the fright. *Spade v. Railroad Co.*, 168 Mass. 285 (47 N. E. Rep. 88; 38 L. R. A. 512; 60 Am. St. Rep. 393); *Hill v. Kimbell*, 76 Tex. 210 (13 S W. Rep. 59; 7 L. R. A. 618); *Mack v. Railroad Co.*, 52 S. C. 323 (29 S. E. Rep. 905; 40 L. R. A. 679; 68 Am. St.

Rep. 913); *Purcell v. Railway Co.*, 48 Minn. 134 (50 N. W. Rep. 1034; 16 L. R. A. 203); *Larson v. Chase*, 47 Minn. 307 (50 N. W. Rep. 238; 14 L. R. A. 85; 28 Am. St. Rep. 370); *Meagher v. Driscoll*, 99 Mass. 281 (96 Am. Dec. 759); *Lombard v. Lennox*, 155 Mass. 70 (28 N. E. Rep. 1125; 31 Am. St. Rep. 528); *Mentzer v. Telegraph Co.*, 93 Ia. 752 (62 N. W. Rep. 1; 28 L. R. A. 72; 57 Am. St. Rep. 234)."

Sec. 799. Destruction of shade trees by a trespasser—Measure of damages. A trespasser destroying shade trees may be held liable for their value to the real estate for the purpose of occupancy. *Gilman v. Brown*, 115 Wis. 1 (91 N. W. Rep. 227). The court say: "The actual damages claimed by plaintiff included destruction of shade and fruit trees, berry bushes and rhubarb plants. Evidence was admitted to prove the value of such things while in position as parts of the realty, and no evidence was given of the diminished value of the land by reason of their destruction. The defendant on the trial substantially conceded this to be the true rule and method of ascertaining damages, and requested no instruction to the jury for any other rule. He now, however, contends that the only measure of damages to the owner, for such injuries is the diminished value of the premises. On this question the views of the courts are not uniform. In New York it has been held in a recent case—*Dwight v. Railroad Co.*, 132 N. Y. 199 (30 N. E. Rep. 398; 15 L. R. A. 612; 28 Am. St. Rep. 563)—that the only method of measuring compensatory damages from the destruction of fruit and shade trees not valuable after their severance from the property is the lessened value of the land itself. That case is not in accord with some earlier cases in New York, but may perhaps be taken as settling the rule in that state. But a different view has been taken elsewhere, and it has often been held that, while that method was open to a plaintiff suffering from a wrongful trespass, it was also open to him to offer proof of the value of the things destroyed to the real estate for the purposes of occupancy. That view is declared by *Sutherland* to be the better one. 3 *Suth. Dam.* § 1019, citing *Railroad Co. v. Bohannon*, 85 Va. 293, 297 (7 S. E. Rep. 236); *Montgomery v. Locke*, 72 Cal. 75, 77 (13 Pac. Rep. 401); *Mitchell v. Billingsley*, 17 Ala. 391, 393; *Wallace v. Goodall*, 18 N. H. 439; *Whitbeck v. Railroad Co.*, 36 Barb. 644; *Folsom v. River Co.*, 41 Wis. 602, 608. The question has never been fully considered by this

court, but in *Andrews v. Youmans*, 82 Wis. 81 (52 N. W. Rep. 23), the latter method was adopted and passed without criticism, the judgment being affirmed on appeal. We think such rule the safe and proper one. It must not be forgotten that recovery in trespass is always based upon a wrongful invasion of the plaintiff's rights, and that the rule of damages adopted should be such as to more carefully guard against failure of compensation to the injured party than against possible overcharge upon the wrongdoer. An owner of real estate has a right to enjoy it according to his own taste and wishes, and the arrangement of buildings, shade trees, fruit trees, and the like may be very important to him, may be the result of large expense, and the modification thereof may be an injury to his convenience and comfort in the use of his premises which fairly ought to be substantially compensated, and yet the arrangement so selected by him might be no considerable enhancement of the sale value of the premises, it might not meet the taste of others, and the disturbance of that arrangement, therefore, might not impair the general market value. Hence, it is apparent that while the owner may be deprived of something valuable to him, for which he would be willing to pay substantial sums of money or which might have cost him substantial sums, yet, he might be wholly unable to prove any considerable damages merely in the form of depreciation of the market value of the land. The owner of property has the right to hold it for his own use as well as to hold it for sale, and if he has elected the former he should be compensated for an injury wrongfully done him in that respect, although that injury might be unappreciable to one holding the same premises for purposes of sale. The case at bar presents an illustration. Amongst the shade trees claimed to have been destroyed was a well-grown willow tree, furnishing shelter from the weather and from the sun's rays. The plaintiff had erected his barn and arranged his barnyards so as to avail himself of this protection, and the defendant himself testified that, while the destruction of that tree would not impair the selling price of the lots, it would substantially interfere with the comfort and convenience of the plaintiff in the use of the barn and in caring for his domestic animals."

In an opinion reviewing the authorities it is held by the supreme court of North Carolina that an action will lie for physical injury or disease resulting from fright or nervous shock, caused by negligence of defendant in blasting at a dis-

tance of 60 paces from plaintiff's house, throwing rocks on and through it, after being asked by her to direct the blasting so that it would not do this. *Watkins v. Kaolin Mfg. Co.*, 131 N. C. 536 (42 S. E. Rep. 983; 60 L. R. A. 617).

TRUSTS.

EPITOME OF CASES.

Sec. 800. Creation of express trust. A parol trust is not void, and a conveyance by the trustee in execution of it is based on a sufficient consideration as against third parties. *McCormick Harvesting Mach. Co. v. Griffin*, 116 Ia. 397 (90 N. W. Rep. 84). A trust in the proceeds of land may be established by the grantee's recognition and acknowledgment thereof after his sale of the land, although proof that the land was conveyed to him in trust is prevented by the statute of frauds. *In re Simond's Estate*, 201 Pa. St. 413 (50 Atl. Rep. 1005). Under Ia. Code, §§ 2918, 4625, an express trust can not rest in parol. *Gregory v. Bowlsby*, 115 Ia. 327 (88 N. W. Rep. 822). Under the statute of Nebraska an express trust can not be created by parol; but it is held that a parol trust, if clearly established, is a sufficient consideration to support an executed deed against the grantor's creditors. *Columbia Nat. Bank v. Baldwin*, 64 Neb. 732 (90 N. W. Rep. 890). See opinion for exhaustive collation and review of cases on this subject. A grantee in an absolute warranty deed, containing a condition for the support of the grantor, will not be declared trustee of an express trust to hold the property and divide it between her brothers and sisters after the grantor's death, on parol evidence, where the grantor lived seven years after the execution of the deed, during all of which time the conduct of the parties was consistent with its provisions. *Verzier v. Convard*, 75 Conn. 1 (52 Atl. Rep. 255). Cal. Civ. Code, §§ 852, 857, 2222 construed and applied—creation of trust in real property—instrument of writing required. *Keough v. Noble*, 136 Cal. 153 (68 Pac. Rep. 579). Wis. Rev. Stat. 1894, ch. 57, §§ 3-5, 11, 16 (Rev. Stat. 1898, §§ 2073-2075, 2081, 2086), construed and applied—abolition of passive trusts, creation of an express active trust. *Perkins v. Burlington Land & Imp. Co.*,

112 Wis. 509 (88 N. W. Rep. 648). For construction of particular deed creating a trust for the benefit of a wife and children, see *Tyack v. Berkeley*, 100 Va. 296 (40 S. E. Rep. 904; 93 Am. St. Rep. 963).

Sec. 801. Statute of uses and passive trusts. A deed to one as trustee for the use and benefit of a named beneficiary, which confers no power on the trustee and imposes no duty on him as such, but makes him merely the repository of the legal title, creates a dry, naked trust, and under Ala. Code, 1896, § 1027 the legal title vests in the beneficiary. *Huntington v. Spear*, 131 Ala. 414 (30 So. Rep. 787). In California a devise of land to trustees to hold the same and dispose of the income for a designated period, and then convey it to the beneficiaries, is void. *In re Sanford's Estate*, 136 Cal. 97 (68 Pac. Rep. 494). When land is conveyed to a trustee, his heirs and assigns, for the benefit of a third person named in the deed as beneficiary, but the conveyance contains no clause in restraint of alienation, the title of the trustee is not nominal only, but the trustee in such conveyance has the power of disposition, and the trust is not executed by the statute of uses. *Webb v. Rockefeller*, 66 Kan. 160 (71 Pac. Rep. 283).

Sec. 802. Spendthrifts' trusts. It is not against the policy of the law to give by will to a beneficiary an equitable right to the income of trust property for his life, without the power of anticipation on his part, and to the entire exclusion of his alienee or creditor. *Jackson Square L. & Sav. Ass'n v. Bartlett*, 95 Md. 661 (53 Atl. Rep. 426; 93 Am. St. Rep. 416). In West Virginia it is held, on review of the authorities, that where a will sets apart in trust in the hands of an executor certain realty, and directs its profits to be applied for the use of testatrix's husband during life, with remainder over, and provides that neither the real estate nor its profits shall be bound for the husband's past or future debts other than respectable and comfortable support, the provision as to exemption from debt is valid. *Guernsey v. Lazear*, 51 W. Va. 328 (41 S. E. Rep. 405). Applying Va. Code, § 2428, which provides that "estates of every kind, holden or possessed in trust, shall be subject to debts and charges of the persons to whose use, or to whose benefit, they are holden or possessed, as they would be if those persons owned the like interest in the things holden or possessed, as in the uses or trusts thereof," it is held that a

provision in a trust deed exempting the estate of the beneficiary from liability for his debts is void; and where, in such a case, the instrument gives the beneficiary an absolute equitable interest in personal property, and the right to what, in the judgment and discretion of the trustee, would be a proper and comfortable support and maintenance out of the rents and profits of certain real estate, his creditors are entitled, for the satisfaction of their claims, to the personal property, and the amount of the rents and profits the debtor could have claimed should have been applied to his benefit. *Hutchinson v. Maxwell*, 100 Va. 169 (40 S. E. Rep. 655; 57 L. R. A. 384; 93 Am. St. Rep. 944). See opinion for collation of cases and discussion of this subject.

Sec. 803. Sale and conveyance by trustee. A trustee with title, and invested by the instrument creating the trust with the power to change the investment, has the right to sell and convey the title to the trust property. *First Nat. Bank of Carlisle v. Lee*, (Ky.) 66 S. W. Rep. 413 (23 Ky. Law Rep. 1897). A trustee having power to do so, who has determined to sell real estate at a certain price, may delegate the closing up of the transaction to his attorney, and he is bound by a contract made by such attorney in accordance with the terms fixed. *Gates v. Dudgeon*, 173 N. Y. 426 (66 N. E. Rep. 116; 93 Am. St. Rep. 608). A purchaser in good faith of lands at a trustee's sale under power given him to sell and which vested in him a discretion as to reinvestment of the trust fund, is not responsible for a due exercise of the discretion. *Redford v. Clarke*, 100 Va. 115 (40 S. E. Rep. 630). One who purchases from a trustee who had authority to sell acquires a title to the property sold, and the title thus acquired is not affected by the subsequent conduct of the purchaser, in knowingly aiding the trustee in a misappropriation of the proceeds of the sale, unless such misappropriation be the result of an arrangement between the purchaser and the trustee before the sale is completed, or the purchaser knew that the trustee was selling for the purpose of misappropriating the proceeds. *Tapley v. Tapley*, 115 Ga. 109 (41 S. E. Rep. 235).

Sec. 804. Trustee dealing with trust property—Purchase at his own sale. The purchase at a trustee's sale by the husband or wife of the trustee may be treated as void by the cestui que trust and ejectment maintained by him against

any one taking with notice of the relation; and such a sale is not given validity by the confirmation of the court, or the proof of nonexistence of fraud and the payment of full consideration. *Frazier v. Jeakins*, 64 Kan. 615 (68 Pac. Rep. 24; 57 L. R. A. 575). See opinion for collation and review of authorities. A trustee purchasing at his own sale can not have the sale set aside for that reason, as a matter of course, the rule against such transactions being for the benefit of the beneficiaries. *Benson v. Benson*, 97 Mo. App. 460 (71 S. W. Rep. 360). The court say: "The transaction in regard to the property amounted to a purchase of it by the appellant, which, as she was acting as trustee of the property, was illegal and voidable at the instance of any cestui que trust. A few decisions have held such purchases by executors and administrators to be utterly void, both at law and in equity; but the weight of opinion is that they are only voidable, and suffice to pass the legal title to property, though probably any court would set one aside at the complaint of a creditor of the estate or a legatee without proof of actual prejudice to the interest of the estate, since the law prohibits a trustee from buying at his own sale. 2 Woerner, *Adm'n* (2d Ed.) § 487; *Melms v. Brewing Co.*, 93 Wis. 153 (66 N. W. Rep. 518; 57 Am. St. Rep. 899); *White v. Iselin*, 26 Minn. 487 (5 N. W. Rep. 359); *Otis v. Kennedy*, 107 Mich. 312 (65 N. W. Rep. 219); *Murphy v. Teter*, 56 Ind. 545; *Anderson v. Green*, 46 Ga. 361; *Borders v. Murphy*, 125 Ill. 577 (18 N. E. Rep. 739); *Fox v. Mackreth*, 1 White & T. Lead. Cas. Eq., pt. 1, note on page 256; *Wilson v. Troup*, 2 Cow. 238 (14 Am. Dec. 458); *Ives v. Ashley*, 97 Mass. 198; *Baines v. McGee*, 1 Smedes & M. 218; *Hance v. McKnight*, 11 N. J. L. 385, *Litchfield v. Cudworth*, 15 Pick. 31. Whatever their holdings on the subject are, courts do not set aside purchases of trust property by trustees at their instance as a matter of course, because the rule against such dealings is intended for the protection of beneficiaries, and was adopted to prevent them from being defrauded by self-serving trustees. *Fox v. Mackreth*, 1 White & T. Lead. Cas. Eq., 257; *Richardson v. Jones*, 3 Gil & J. 163 (22 Am. Dec. 293)."

Sec. 805. Revocation or termination of trusts. A voluntary conveyance of property in the nature of a deed of trust reserving to the grantors and the survivor a life interest, with direction at their death to sell and divide the proceeds among others, is not testamentary and therefore revocable, where no

power of revocation is reserved. *Kraft v. Neuffer*, 202 Pa. St. 558 (52 Atl. Rep. 100). A donor in a deed conveying land in trust to trustees, for certain uses and purposes specified in the deed, which stipulates that no rights were to pass to any one until the death of the donor and his wife who were to have full possession of the land and the rents and profits thereof during their lives, during which neither the donee nor any one claiming under him was to take any interest under the conveyance, may be reinvested with a perfect title, all parties consenting and all the beneficiaries being of age, by a conveyance joined in by the trustees and the beneficiaries. *Lewis v. Howe*, 174 N. Y. 340 (66 N. E. Rep. 975).

VENDOR AND VENDEE.

EPITOME OF CASES.

Sec. 806. Estate and rights of vendor and vendee. A mere executory contract to sell and convey does not give the prospective purchaser any estate in the land. *Young v. Latham*, 132 Ala. 341 (31 So. Rep. 448). One to whom another is bound by a contract under seal to convey lands has an interest therein, within the meaning of Wis. Rev. Stat. 1898, § 2302, which can only be surrendered by writing abrogating the contract or by acts of the parties inconsistent with its continuance and which acts have been acted on by all parties concerned. *Maxon v. Gates*, 112 Wis. 196 (88 N. W. Rep. 54). The right of a vendee to rescind his contract of purchase and recover money expended for improvements passes to one to whom he has assigned "all his right, title, interest and claim" in the land. *Latimer v. Capay Val. Land Co.*, 137 Cal. 286 (70 Pac. Rep. 82). A grantee of land subject to a lien for part of the purchase price evidenced by the grantor's note given therefor, is primarily liable for such debt and can not take an assignment of the notes and recover thereon against his grantors. *Wade v. Bent*, (Ky.) 71 S. W. Rep. 444 (24 Ky. Law Rep. 1294). In the absence of an agreement to the contrary, it is presumed that the seller is to receive payment at his place of residence; and,

where the purchaser of real estate requires the delivery of deed thereto upon payment made at a place other than this, the seller may attach further conditions to the delivery of such deed. *Hinish v. Oliver*, 66 Kan. 282 (71 Pac. Rep. 520). Where a vendor agrees to execute a warranty deed upon certain payments being made, a tender of these payments on condition that the deed be executed is sufficient. *Maris v. Masters*, 31 Ind. App. 235 (67 N. E. Rep. 699).

807. Recovery of damages for injury. A vendee of property may recover damages for a prior unlawful entry on the premises by a telegraph company to construct a telegraph line thereon, where it continues its unlawful occupation after his purchase. *Phillips v. Postal Tel. Cable Co.*, 130 N. C. 513 (41 S. E. Rep. 1022; 89 Am. St. Rep. 868). In Pennsylvania one acquiring title to property abutting on a street after the passage of an ordinance authorizing its grading, but before the work of grading actually had begun, can recover for the injury to the property. Pub. Laws 1891, pp. 75, 117, construed and applied. *Howley v. City of Pittsburg*, 204 Pa. St. 428 (54 Atl. Rep. 347). An owner of land who conveys it to an innocent purchaser by warranty deed, pending appropriation of the same to a public use, is not entitled to have the damages subsequently awarded to his vendee applied to his purchase money mortgage, where they do not equal the amount of the cash payment made by such vendee. *Shields v. City of Pittsburg*, 201 Pa. St. 328 (50 Atl. Rep. 820).

Sec. 808. Auction sale—Rights of parties. A purchaser at an auction sale of property advertised as "the choice business corner known as No. 368 Grove Street, southwest corner of First Street, Jersey City * * * being 25 feet front on Grove and 100 feet on First Street," is entitled to conveyance of the whole corner according to a general description in the advertisement, a copy of which was attached to the written conditions of sale signed by him, regardless of the fact that the frontage on Grove Street was a few inches more than 25 feet. *Gough v. Williamson*, 62 N. J. Eq. 526 (50 Atl. Rep. 323). Where a purchaser at auction sale makes a deposit on account of his purchase, and subsequently fails to complete his purchase by paying the balance according to the terms of the sale, the vendor has the right to resell the property, and charge the first purchaser with the loss and damages sus-

tained by reason of his failure to fulfill his contract, and also to deduct the same from any deposit which he may have in his hands arising from the first sale. It is not absolutely necessary that the property should be sold at auction, or that the first purchaser be notified thereof; all that he is entitled to is that the second sale shall be fair and honest in every way, and that the vendor shall take all reasonable means to get the most he can for the property. *McKiernan v. Valleau*, 23 R. I. 501 (51 Atl. Rep. 102).

Sec. 809. Sufficiency of consideration for contract—Ratification of contract. The privilege of naming a child is a valid and legal consideration for an agreement to convey land to the child, made with its parents; and where the child was named by them in accordance with the agreement, a ratification of the agreement is shown, and the privity between the parents and child is such that the latter may enforce the contract. Such a contract is not rendered unenforceable by the fact that the promisor did not own land with which to perform the promise at the time it was made, where he afterwards acquired a tract with which, according to his declarations, it appeared that he intended to fulfill his contract. *Daily v. Minnick*, 117 Ia. 563 (91 N. W. Rep. 913; 60 L. R. A. 840). Acts performed by third persons in compliance with the terms of a contract for the sale of land, in which they are not named, taken in the name of a third person who is not shown to have been their agent, do not make the contract binding on them on the ground of ratification. *Ferris v. Snow*, 130 Mich. 254 (90 N. W. Rep. 850). Where a vendor and vendee, in a dispute as to the character of deed to be given, submit their differences to an arbitrator, and after his award the vendor delivers to him a deed to be delivered to the vendee upon his making certain payments, the latter, by accepting the deed and making the payments, will be held to have taken it in full compliance with the contract, and has no right of action except on the deed itself, although he protested against the sufficiency of the deed at the time of accepting it. *Porter v. Cook*, 114 Wis. 60 (89 N. W. Rep. 823).

Sec. 810. Completion of contract negotiated through the mails. In the case of *Scottish-American Mortg. Co. v. Davis*, Tex. Civ. App. (72 S. W. Rep. 217), the court of civil appeals of Texas say: "It is held by the great weight

of authority that, where negotiations relative to the sale of land are conducted through the mails, the contract is completed the moment the proposed purchaser mails a letter addressed to the party offering to sell, accepting the offer, if done within a reasonable time, and before he receives notice of a withdrawal of the offer to sell. *Blake v. Ins. Co.*, 67 Tex. 160 (2 S. W. Rep. 368; 60 Am. Rep. 15); *Kempner v. Cohn*, 47 Ark. 519 (1 S. W. Rep. 869; 58 Am. Rep. 775); *Levy v. Cohen*, 4 Ga. 1; *Bryant v. Booze*, 55 Ga. 438; *Hunt v. Higman*, 70 Ia. 406 (30 N. W. Rep. 769); *Taylor v. Ins. Co.*, 9 How. 390 (13 L. Ed. 187); *Moore v. Pierson*, 6 Ia. 279 (71 Am. Dec. 409); *Ferrier v. Storer*, 63 Ia 484 (19 N. W. Rep. 289; 50 Am. Rep. 752); *Benj. Sales*, § 44; *Hallock v. Ins. Co.* 26 N. J. L. 268; *Lungstrass v Ins. Co.*, 48 Mo. 201 (8 Am. Rep. 100); *Vassar v. Camp*, 11 N. Y. 441. In *Hallock v. Ins. Co.*, 26 N. J. L. 268, the court says: 'The acceptor can no more overtake and countermand his letter mailed, than he can his words of acceptance after they have issued from his lips. The bargain, if struck, must be eo instante with such overt act. Mailing letter containing an acceptance, or the instrument itself, intended for the other party, is certainly such overt act.' In *Vassar v. Camp*, 11 N. Y. 441, where a letter was mailed accepting an offer, it was held that the contract was completed and binding, though it was never received by the proposer." For particular correspondence between attorney of purchaser and attorney of trustee having property for sale held to constitute a binding contract of sale, see *Gates v. Dudgeon*, 173 N. Y. 426 (66 N. E. Rep. 116; 93 Am. St. Rep. 608).

Sec. 811. Bond for title. Where a vendor has given a bond for title to his vendee who has paid part of the purchase price, taken possession, and given his notes for the remainder of the purchase money, after a transfer of such notes to a third person for value, conveys the land to another, such grantee takes with notice of the rights of obligee in the bond for title and acquires no rights against him, and a payment by him to the holder of the notes gives him a complete equity in the land, both as against the vendor and the grantee in the deed from him. *Georgia State Bldg. & L. Ass'n v. Faison*, 114 Ga. 655 (40 S. E. Rep. 760).

Sec. 812. Option contracts. The assignee of an option takes subject to the defects which could be asserted against

his assignor. *National Oil & Pipe Line Co. v. Teel*, 95 Tex. 586 (68 S. W. Rep. 979). An option given one to purchase lands within a stated time at a given price must be exercised within the time limit or it will be lost. *Larned v. Wentworth*, 114 Ga. 208 (39 S. E. Rep. 855). Citing, *Longfellow v. Moore*, 102 Ill. 289; *Mason v. Payne*, 47 Mo. 517; *Carter v. Phillips*, 144 Mass. 100 (10 N. E. Rep. 500); *Kemp v. Humphreys*, 13 Ill. 573; *Potts v. Whitehead*, 20 N. J. Eq. 55; *Vassault v. Edwards*, 43 Cal. 458; *Longworth v. Mitchell*, 26 O. St. 334. Under a contract to convey certain property to T. D. L., for a named consideration, upon "the condition that said T. D. L. desires to buy the same by the first of March, 1900," not only the option must be exercised, but also the money paid or tendered, within the specified time. *Lockman v. Anderson*, 116 La. 236 (89 N. W. Rep. 1072). An option contract to purchase is but a continuing offer to sell, and conveys no interest in the property. When such a contract is accepted it takes effect from the date of acceptance, and binds the grantee only to a conveyance of the property in its present condition. If, intervening the offer and acceptance, the improvements thereon are destroyed by fire, equity will not decree a specific performance of the contract, with the improvements restored, or with an abatement of price equal to the value of the lost improvements. *Caldwell v. Frazier*, 65 Kan. 24 (68 Pac. Rep. 1076).

Sec. 813. Construction of land contracts—Forfeitures.

Time will not be treated as of the essence of a contract unless it appears from its terms or by the conduct of the parties that it was their design to render it essential. *Maris v. Masters*, 31 Ind. App. 235 (67 N. E. Rep. 699). See opinion for particular case in which time was held not to be of the essence of the contract. A vendee does not forfeit his contract by failure to make payments to his vendor after he has put it out of his power to comply with his contract by conveying the property to another. *Broadhead v. Reinbold*, 200 Pa. St. 618 (50 Atl. Rep. 229; 86 Am. St. Rep. 735). A vendee who, upon receiving notice from his vendor to vacate the premises on account of his defaults, in accordance with the terms of the contract, thereupon leases the premises from his vendor, thereby surrenders his rights under the contract. *Miner v. Boynton*, 129 Mich. 584 (89 N. W. Rep. 336). Where the covenants in a written contract for the sale of real estate are mutual and de-

pendent, the vendor's obligation to convey being dependent upon a cash payment and the execution of notes and a mortgage by the vendee, and time for perfecting title is not made of the essence of the contract, the vendee can place the vendor in default only by tendering performance on his part; and, in the absence of such tender, he is not entitled to rescind the contract and recover back payments made when the contract was executed. *Arnett v. Smith*, 11 N. Dak. 55 (88 N. W. Rep. 1037). Where a contract between a father and daughter gave her the right to occupy his house which was to become hers at his death, on condition, among other things, that she pay the taxes, his voluntary payment of taxes which she, while in possession, failed to pay operates as a waiver of forfeiture of the contract. *Sheldon v. Dunbar*, 200 Ill. 490 (65 N. E. Rep. 1095). In the case of sale of lands whose value is not precarious nor fluctuating, and the execution of a bond for title by the vendor to the vendee, and part payment of the purchase price by the vendee, who takes possession of said land under the contract, equity will not declare a forfeiture against the vendee, in the absence of any stipulation for a forfeiture in the contract, when the contract does not in terms make time of the essence of such contract. *Castlebarry v. Hay*, Ida. (70 Pac. Rep. 1055). A forfeiture provided for in a contract for failure to make payments at specified dates must be promptly invoked by the vendor, and where he fails to do so and the defaulting vendee, who has paid several installments of the purchase price, greatly improved the land and tendered the balance due shortly after the time for making the last payment, he is entitled to specific performance. *Burroughs v. Jones*, 79 Miss. 214 (30 So. Rep. 605). See, on this subject, *Whiting v. Doughton*, 31 Wash. 327 (71 Pac. Rep. 1026).

Sec. 814: Construction of land contracts—Particular cases. A stipulation in a contract for the sale of land binding the vendee to reconvey to the vendor for a certain sum when he concludes to sell, is valid; and its enforcement is not prevented by a natural and expected increase in the value of the property, nor on account of the vendee having made improvements on it, where he is given an option to remove them or accept a certain sum therefor. *Peterson v. Chase*, 115 Wis. 239 (91 N. W. Rep. 687). A stipulation in a contract of sale of rural property binding the vendor to pay "all mortgages, judgments, liens, claims and incumbrances," does not bind him

to pay the cost of a water pipe laid in front of the property by a city where it has no right to demand payment therefor while the property remains rural, except from one who desires to use water from the pipe. *Gilham v. Real Estate Title Ins. & T. Co.*, 203 Pa. St. 24 (52 Atl. Rep. 85). A stipulation by a corporation in a contract for the sale of its properties executed in March, that all of its "liabilities" should be, by it, "liquidated or provided for," includes the lien for taxes fixed by the statute as of February 1st, though the amount was not ascertained by the authorities until the following September. *Vicksburg Waterworks Co. v. Vicksburg Water Supply Co.*, 80 Miss. 68 (31 So. Rep. 535). A proposition by a bank to a broker in whose hands it has placed property for sale that if it could realize, net, \$7,000 for the property, it "would sell the same; this means that we are to receive \$7,000, free of all commissions, taxes, and all other charges that may stand against the property" was held to mean that the owner would convey the property for \$7,000, net, the purchaser to take subject to all existing encumbrances and liens and that the word "taxes" included special assessments. *Gibbs v. People's Nat. Bank*, 198 Ill. 307 (64 N. E. Rep. 1060). It is held by the supreme court of Ohio, in an opinion admitting that the soundness of the holding might be doubted, that, where a vendor of land has obligated himself by a written contract to convey "by good warranty deed and abstract of title from organization of county," but the contract contains no stipulation for a deed containing a covenant against incumbrances generally, and none against any inchoate dower right, it is not essential to the performance of the contract by the vendor that his wife should join in the deed and release her right of dower. *People's Sav. Bank v. Parisette*, 68 O. St. 450 (67 N. E. Rep. 896; 96 Am. St. Rep. 672). Where a contract for the sale of land contains a clause declaring it shall be null and void if the land is not "as understood" by the vendee, it is incumbent upon him to act under it within a reasonable time, and before he pays for the land and accepts a deed. *Weller v. Minnesota Land & Colonization Co.*, 87 Minn. 227 (91 N. W. Rep. 891). Where a contract to convey certain lots proposed by the vendor to be afterward platted and the plat filed, upon the payment of a nominal sum constituting the remainder of the purchase price, stipulates that it is to be regarded as the bond for a deed to be executed "whenever said plat is recorded," the vendor has a reasonable time in which to record his plat and convey the lots, but after nine

years delay the vendee may have rescission and recover purchase money paid and the value of improvements erected on the land. *Isaacs v. Bardon*, 114 Wis. 142 (89 N. W. Rep. 913). Where one to whom two propositions written on the same paper, but separately signed, are made, one to sell land to him and one to buy land, "title to be merchantable," endorses his acceptance on the back, "I accept the within if the title proves satisfactory," such acceptance applies to each; and each contract is distinct. *Bolton v. Huling*, 195 Ill. 384 (63 N. E. Rep. 140).

Sec. 815. Defects in title and deficiencies in quantity.

A vendee is not bound to take a defective title on account of his vendor offering to give an indemnifying bond. *Trimmer v. Gorman*, 129 N. C. 161 (39 S. E. Rep. 804). In the absence of fraud or relievable mistake, the grantee who accepts a deed without covenants can not successfully defend against a suit for the purchase money on the ground of failure of title. *Horner v. Lowe*, 159 Ind. 406 (64 N. E. Rep. 218). The fact that a third party has a right to the waters of a spring on land sold and an easement for piping the same, although created by a reservation unknown to both vendor and vendee and affecting only a small portion of the land, may constitute such a substantial defect in the title as to give the vendee the option of abandoning the contract. *Melick v. Cross*, 62 N. J. Eq. 545 (51 Atl. Rep. 16).

A vendee purchasing the whole of a tract of land at an agreed price from one in possession thereof, who points out his boundaries, may recover from his vendor pro rata the value of a part of such tract which he discovers, after payment of the purchase price and taking of a deed, is not covered either by his grantor's deed or title, and of which he did not take possession. *Equitable Trust Co. v. Milligan*, 31 Ind. App. 20 (65 N. E. Rep. 1044). Where a vendor represents that he has the record title to a lot of a certain width and agrees to convey such title, a rescission may be decreed upon a showing that he has the record title to only a part of the lot, although he has title to the remainder by adverse possession and honestly believed at the time of his representations that he had the record title to the whole of the lot. *Zunker v. Kuehm*, 113 Wis. 421 (88 N. W. Rep. 605). A vendee is entitled to rely on his vendor's representations as to the acreage of a tract of land, and where there is a deficiency, the vendee may rescind the contract or en-

force it with a deduction in the purchase price proportionate to the deficiency; but the right of this election is in him only. *Quarg v. Scher*, 136 Cal. 406 (69 Pac. Rep. 96). Where a sale of land either by deed or contract describes the tract as containing a given quantity, but says, "be the same more or less, and is conveyed by the boundary, and not by the acre," there can be no abatement of purchase money for deficiency of quantity, in the absence of intentional fraud. *Adams v. Baker*, 50 W. Va. 249 (40 S. E. Rep. 356). To the same effect is the case of *Finne v. Morris*, 116 Ga. 758 (42 S. E. Rep. 1020). One induced to purchase a tract of land by misrepresentations as to the quantity contained is not bound to rescind in toto upon discovering the fraud, but may retain the tract and obtain an adjustment of equities as to the deficiency; and, in adjusting these equities, compensation may be made for the deficiency at the rate per acre which would have been paid had the quantity been as represented, there being no evidence to show that one part of the tract is more valuable than another. *McGhee v. Bell*, 170 Mo. 121 (70 S. W. Rep. 493; 59 L. R. A. 761). A vendor who conveys a tract of land with a general warranty as containing 33½ acres, more or less, when the survey as made by a competent surveyor under his direction showed the boundary to contain only 20½ acres, is bound to make good the difference. Ordinarily, where there is a deficiency in the quantity of land sold, the purchaser will be entitled to compensation for the deficiency according to the average value of the whole tract; But where he gets all the improvements in the way of houses, etc., which it was contemplated he should receive, that fact will be considered in fixing the value of the deficiency. *Patton v. Schneider*, (Ky.) 66 S. W. Rep. 1003 (23 Ky. Law Rep. 2190). For particular fact cases on this topic, see *Mount v. Harrell*, 107 La. 481 (32 So. Rep. 72); *Sibley v. Hayes*, 96 Tex. 78 (70 S. W. Rep. 538).

Sec. 816. Action for purchase money. A complaint to recover the first installment of the purchase price of a lot, from a vendee who has bought it and agreed to pay the purchase price in installments to become due as certain conditions as to the sale of other lots and the erection of a factory by the vendor have been performed, must allege the performance of the conditions entitling the vendor to recover. *Collins v. Amis*, 159 Ind. 593 (65 N. E. Rep. 906). A purchaser of property to be paid for in installments, where there is no time

fixed for the delivery of the deed, is not entitled to receive his deed until the last payment is made; and where all the installments are due, the vendor may sue for all of them except the last one without tendering a deed. *Gray v. Meek*, 199 Ill. 136 (64 N. E. Rep. 1020). For discussion of what tender or acceptance of a deed is essential to authorize an action by a vendor for the purchase price, see *Beckrich v. City of North Tonawanda*, 171 N. Y. 292 (64 N. E. Rep. 6).

Sec. 817. Defenses to action for purchase money.

Where a deed has been accepted, the purchaser can not refuse to pay purchase money, unless his grantor is insolvent, or the title is proven to be bad, or a suit endangering it is actually pending or threatened, and in the last case the grounds of suit must be given, and they must be such as ought to cause a reasonable man to fear loss of his land. *Jackson v. Welsh Land Ass'n*, 51 W. Va. 482 (41 S. E. Rep. 920). A purchaser at an executor's sale, sued on notes given for the purchase price, can not assert the invalidity of the sale as a defense to the notes and also retain possession of the land. *Keen v. McAfee*, 116 Ga. 728 (42 S. E. Rep. 1022). A vendee under an executory contract can not resist the payment of the purchase money on the ground that since his contract and his taking possession thereunder, he has acquired a sheriff's deed to the land through taking an assignment of the bid of a purchaser thereof at execution sale made against the vendor; but he is only entitled to a credit for the amount he paid for such assignment. *Fuson v. Lambdin*, (Ky.) 66 S. W. Rep. 1004 (23 Ky. Law Rep. 2245). As against one to whom a note given for part of the purchase price for land has been transferred after maturity, the vendee may set off money paid by reason of the breach of vendor's warranty against incumbrances. *Wolf v. Shelton*, 159 Ind. 531 (65 N. E. Rep. 582). A vendee can not defend against an action to recover installments of the purchase price unpaid on the ground that his default was a cause for the forfeiture of the contract by the vendor, of such long standing that he supposed the vendor had elected to rely on the forfeiture. *North Stockton Town Lot Co. v. Fischer*, 138 Cal. 100 (70 Pac. Rep. 1082).

Sec. 818. Retention of title to secure purchase money.

The retention of the legal title as security for the purchase price amounts merely to an equitable mortgage; the vendee is the

owner of the land, and on his death it descends to his heirs, or to those to whom he may have devised it by will. *Love v. Butler*, 129 Ala. 531 (30 So. Rep. 735). The right of a vendor retaining title to secure several notes given for the purchase price, to rescind for nonperformance, is suspended by his assignment of one of the notes to a third party, until he regains title to it; and such assignee acquires a proportionate part of the lien which he may foreclose, and a foreclosure of it by such assignee bars the vendor's right to rescind while the sale under such foreclosure judgment remains in force, nor can he claim the right to redeem from such sale to which he was not made a party, in order to regain this right. *Douglass v. Blount*, 95 Tex. 369 (67 S. W. Rep. 484; 68 L. R. A. 699). Where the vendor of real estate executes to the vendee a bond for a deed, the vendee giving notes for the purchase price, the reservation of the legal title by the vendor is security for the payment of the purchase price, and, upon default of the vendee, the vendor may treat the contract as a mortgage, and foreclose it as such. If notes are given for the purchase price, an assignment of one of them carries with it an equitable assignment pro tanto of the lien of the vendor, subject to judgments of record against him at the time of the assignment; and such assignment must be recorded in order to protect the rights of the assignee against a subsequent purchaser or incumbrancer of the vendor without notice of such rights. *First Nat. Bank v. Edgar*, Neb. (91 N. W. Rep. 404).

Sec. 819. Vendor's lien—Creation—Priority. A vendor conveying real estate and placing his vendee in possession thereof, under a contract by which the latter agrees to pay the stipulated price in such annual installments as she can, retains a lien on the land for the price. *Hubbell v. Henrickson*, 175 N. Y. 175 (67 N. E. Rep. 302). Land held under a devise made to one, in consideration of his having executed his notes to another for whom the testator desired to provide, is subject to a vendor's lien for the payment of such notes, and persons succeeding to his estate take subject to such lien. *Ballard v. Camplin*, 161 Ind. 16 (67 N. E. Rep. 505). A devise of land to one, he to pay a certain sum of money to the testator's executor, upon acceptance by the devisee, creates a purchase money lien on the land in his hands for the sum to be paid by him which has priority over all other liens or claims created upon the land by him, as well as judgments recovered against

him. *Marshall v. Hall*, 51 W. Va. 569 (42 S. E. Rep. 641). A purchaser of one of two promissory notes equally secured by a vendor's lien, under an agreement giving a priority of lien to the note purchased, who fails to have such agreement recorded, can not enforce it against a subsequent purchaser without notice of the other note. *Lewis v. Ross*, 95 Tex. 358 (67 S. W. Rep. 405). A stipulation in a deed that a certain surety of the grantee shall have an indemnifying lien on the land, may be enforced by the surety, though a stranger to the deed. *Blakeley v. Adams*, Ky. (68 S. W. Rep. 393; 24 Ky. Law Rep. 324).

Sec. 820. Vendor's lien—Loss or waiver. Where a conveyance recites that it is made in consideration of certain described notes given by third persons the vendor's lien is waived. *Walton v. Young*, 132 Ala. 150 (31 So. Rep. 448). One having an equitable vendor's lien for purchase money notes does not waive it by accepting from his vendee as collateral security purchase money notes taken by him from one to whom he has sold the land. *Hood v. Hammond*, 128 Ala. 569 (30 So. Rep. 540; 86 Am. St. Rep. 159). A vendor who, in pursuance of an agreement with his insolvent vendee, conveys to the latter's wife taking a conveyance of other land from her as part payment and the note of the husband payable in bank for the balance of the purchase money, does not thereby lose his vendor's lien for the amount of such balance. *Scott v. Edgar*, 159 Ind. 38 (63 N. E. Rep. 452).

Sec. 821. Vendor's lien—Loss by agreement to take stock in corporation for purchase price. A vendor's lien for the purchase price of land conveyed to a corporation is not lost by reason of the fact that it was agreed that the corporation might pay the debt in shares of its stock. *Harter v. Capital City Brewing Co.*, 64 N. J. Eq. 155 (53 Atl. Rep. 560). The court say: "I will here remark that it is not to be conceded that the law is settled that, if the contract was such as to permit the corporation to pay the shares of stock, the vendor's lien for such portion of the consideration was thereby lost. In the case of *Fisk v. Potter*, *41 N. Y. 64-77, the New York court of appeals held—apparently without much consideration—that, if the price for land is payable in some commodity other than money, the vendor's lien is lost. And it appears that the rule, as settled by the great weight of authority, that, where the

consideration for the land sold is other land or personal property, with no monetary price fixed, for which the land or personal property shall be delivered, there can be no lien. Thus, in the case of *Harris v. Hanie*, 37 Ark. 348, the consideration for the land sold was cotton to be delivered. In holding that there was no vendor's lien the court said that a vendor's lien does not arise to secure the performance of any act, the breach of the performance of which would create a claim for unliquidated damages. In this case there was no money consideration for the land expressed in the deed. But in the case of *Young v. Harris*, 36 Ark. 162, there was a price fixed for the land, and an agreement that the price should be paid for in personal services, and it was held, that the vendor's lien existed. The amount of the consideration in that case was liquidated, and for that amount a lien existed until paid. In *Plowman v. Riddle*, 14 Ala. 169 (48 Am. Dec. 92), a note was given for the consideration, which, by the terms of the contract of sale, the vendor had the right to discharge by delivering leather. In *Deason v. Taylor*, 53 Miss. 697, the consideration was a note payable in Mississippi certificates of indebtedness. In *Beal v. Harrington*, 116 Ill. 113 (4 N. E. Rep. 664), the consideration was certain lots of land and certain personal property, the price of which lands and the price of which personal property were fixed. In each of these three cases the existence of the vendor's lien was recognized." Where a party sells real estate and personal property by quitclaim deed, and at the same time makes a contract by the terms of which he agrees that the purchaser may sell to other parties, or organize a corporation, and, in case of a corporation, he to receive a certain portion of the paid-up nonassessable stock, to be placed in the hands of a trustee to be named by him, and such stock is issued and placed as by the terms of the contract agreed upon, the balance of the purchase price to be paid out of the net earnings of the property sold, he accepts such stock as his security for such balance, and has no lien upon the property so sold. *Dalliba v. Riggs*, 7 Ida. 779 (67 Pac. Rep. 430).

Sec. 822. Action to enforce vendor's lien—Parties, pleading and practice. The wife is not a necessary party to an action to enforce a vendor's lien on land purchased by her husband. *Jackson v. Bradshaw*, 28 Tex. Civ. App. 394 (67 S. W. Rep. 438); *Schaefer v. Purviance*, 160 Ind. 63 (66 N. E. Rep. 154). Persons to whom a grantee in a deed, in which

a vendor's lien was reserved, has conveyed the land before suit brought to enforce the lien, are not necessary parties; but a failure to make them parties leaves open their right to redeem. *Talbot v. Roe*, 171 Mo. 421 (71 S. W. Rep. 682). Where two equal notes secured by a vendor's lien are separately owned by two persons, and one of them forecloses without making the other a party, and purchases the property at his sale, a subsequent purchaser from him is entitled, upon foreclosure by the owner of the other note, to one-half the proceeds of the sale, if not in excess of the debt, and to any excess over the amount of the debt. *Lewis v. Ross*, 95 Tex. 358 (67 S. W. Rep. 405). Where, in an action to foreclose a vendor's lien, the complaint correctly described the land and the judgment recited that it was based on a note given for the purchase price of land and directed that "a vendor's lien be enforced against the said land, and that it be sold to satisfy said judgment," a sale of the land thereunder will not be held invalid on collateral attack on account of the failure of the judgment to describe the land. *Talbot v. Roe*, 171 Mo. 421 (71 S. W. Rep. 682). Where an owner of land subject to a vendor's lien sells it in smaller tracts to different purchasers, the tracts should be sold in the inverse order of their alienation to satisfy the lien; but a complaint to enforce the lien against one of the parcels is not demurrable because of failure to allege that it was the last parcel sold. See opinion for particular plea of abatement held insufficient in such a case. *Diamond Flint Glass Co. v. Boyd*, 30 Ind. App. 485 (66 N. E. Rep. 479).

Sec. 823. Action to enforce vendor's lien—Defenses.

A court of equity will consider the defense of waiver of lien without its being specially pleaded, where minors are interested defendants. *Lucas v. Wade*, 43 Fla. 419 (31 So. Rep. 231). In order for a purchaser to defend against a vendor's lien reserved in a deed accepted by him, he must clearly show actual defect of title, or a suit pending or threatened involving it, and the ground on which the cloud rests. *Bennett v. Pierce*, 50 W. Va. 604 (40 S. E. Rep. 395). In Alabama it is no defense to an action to enforce a vendor's lien that the debt secured is barred by the statute of limitations; nor that the vendor has failed to present his claim against the estate of a deceased vendee within the time allowed by statute. *Hood v. Hammond*, 128 Ala. 569 (30 So. Rep. 540; 86 Am. St. Rep. 159).

WASTE.

EPITOME OF CASES.

Sec. 824. Waste by life tenant—Cutting of timber by a tenant by the curtesy—Right of tenant of particular estate to cut timber. A tenant for life, who holds the estate without impeachment for waste, is not liable at law to a remainderman for waste committed, though he may be restrained by a court of equity, at the instance of a remainderman, from committing further acts of waste in the future which are destructive of the inheritance or of a wanton and malicious nature. *Belt v. Simkins*, 113 Ga. 894 (39 S. E. Rep. 430). A tenant by the curtesy, as an incident to his estate, may take reasonable estovers of all kinds, and he may cut timber to pay taxes, or to improve the land, and when so cut it belongs to the tenant, and not to the reversioner. But the cutting down by the tenant of trees for sale is waste, and the felling of trees by the tenant or others for a sale of them is an injury to the inheritance, for which the reversioners have their appropriate action. Trees, when felled, or severed from the soil, become personal property, in which the tenant in possession has no interest when cut for profit; and the reversioner may maintain his action for the possession of the property, or for damages therefor, in the same manner and with like effect as if he were the owner of the estate in possession. *Learned v. Ogden*, 80 Miss. 769 (32 So. Rep. 278; 92 Am. St. Rep. 621).

In discussing the right of a tenant of a particular estate to cut timber, the supreme court of Mississippi in the case of *Board of Sup'rs v. Gans*, Miss. (31 So. Rep. 539), says: "By the common law of England, 'waste' is defined with great accuracy, and ancient statutes there have made tenants for years liable for waste. The doctrine has been adopted in this country so far as it is suitable to our condition and circumstances as a new and growing country, and, in a more or less modified form, is administered in most, if not all, of the states of the American Union. The rigid rule of the common

law that a tenant of a particular estate could not cut timber, except for estovers only, is in many jurisdictions modified so as to allow him to cut off the timber for clearing so much of the estate as the needs of his family may require for their support, though the timber be destroyed thereby. And he may clear for cultivation such portion of it as a prudent owner in fee would clear for that purpose, provided he leaves enough timber and wood as may be necessary for the permanent use and enjoyment of the inheritance. His right to open and clear for cultivation wild and uncultivated land is that of a prudent owner, having regard to its amelioration as an inheritance. When the particular tenant cuts timber in the process of clearing the land for immediate cultivation, he can appropriate it or its proceeds to his own benefit, but he can not cut the timber for sale without making himself amenable for waste. When the timber is cut by the tenant or others unnecessarily or unlawfully, the right of the reversioner or remainderman at once attaches, and he may bring an action on the case in the nature of waste for his damages, or he may bring trover or replevin for the timber severed from the inheritance. Whether the tenant cut timber unnecessarily upon a claim of so doing for reasonable estovers or for the cultivation of the land, and whether sufficient wood and timber were left for the permanent use of the inheritance, are questions for the decision of the jury. 4 Kent, Comm. p. 76, et seq., and notes; *Jackson v. Brownson*, 7 Johns, 232 (5 Am. Dec. 258); *Mooers v. Wait*, 3 Wend, 104 (20 Am. Dec. 667). These views of waste we regard as just and reasonable."

WATERS AND WATERCOURSES.

EPITOME OF CASES.

825. Right to natural flow of water—What constitutes a water course. Owners of an upper estate can not be enjoined from permitting the water from their lands to flow its natural way, even though the lower estate be injured thereby. *Schwartz v. Nie*, 29 Ind. App. 329 (64 N. E. Rep. 619). A definite channel, with bed and banks, having at all times substantial indications of the existence of a stream, and through

which water flows, though not at all times of the year, is a water course; and its character as a natural water course is not changed by the construction of a ditch over and along the same, so that its waters were confined in the artificial channel of the ditch. *Schwartz v. Nie*, 29 Ind. App. 329 (64 N. E. Rep. 619). For particular depression in land held not to constitute a water course, see *Sanguinetti v. Fock*, 136 Cal. 466 (69 Pac. Rep. 98; 89 Am. St. Rep. 169).

Sec. 826. Subterranean waters. To give one a right in subterranean waters which he can enforce to the extent of enjoining excavations made in good faith by an adjoining owner, it must be shown that they flow in a well-defined and distinct underground channel, the existence of which is known or easily ascertainable. *Board of Sup'rs of Clarke County v. Mississippi Lumber Co.*, Miss. (31 So. Rep. 905). A landowner's diversion by means of ditches or tunnels constructed on his land for purposes connected therewith, of subterranean waters having no fixed and definite channel, but which were accustomed to percolate through the soil so as to form the source of a spring on an adjoining owner's land, is *damnum absque injuria*. *Miller v. Black Rock Springs Imp. Co.*, 99 Va. 747 (40 S. E. Rep. 27; 86 Am. St. Rep. 924); *Herriman Irr. Co. v. Keel*, 25 Utah, 96 (69 Pac. Rep. 719). See opinions in both of these cases for exhaustive collation and review of authorities on this subject.

827. Mill dams and water rights—Miscellaneous notes
A riparian owner may build a dam across a stream on his own land, provided that thereby he does not appreciably diminish the amount of water which should naturally flow onto the land of his neighbor below. *Fisher v. Feige*, 137 Cal. 39 (69 Pac. Rep. 618; 59 L. R. A. 333; 92 Am. St. Rep. 77). The right to flow lands by the raising of a dam, when for "public benefit," given by Vt. Stat., ch. 159, does not extend to giving the owner of a dam the right to raise it to generate electricity for the operation of a railroad. *Avery v. Vermont Electric Co.*, 75 Vt. 235 (54 Atl. Rep. 179; 59 L. R. A. 817). See opinion for discussion of this subject. Where a mill is erected and a water power is obtained by the aid and co-operation of adjoining landowners, any right of flowage over their premises of water for the mill arranged or contemplated by the owners, as subscribers toward its construction, becomes appurtenant to

the mill. A subsequent use for less than ten years of real estate for flowage of water by gradual encroachment without agreement with the owners, and without compensation to them and not contemplated at the time of the subscription, will not create an interest in the real estate so flowed, nor establish an irrevocable license to so use it. Only a right to enjoy the privilege, and no fee title or right to exclude the owner, can, in any case, be established by mere user of a privilege of flowage. *Johnson v. Sherman Co. Irr. Co.*, 63 Neb. 510 (88 N. W. Rep. 676). A conveyance of a tract of land, on which there is a grist and saw mill, together with "the right to use the water power and mill privilege on said premises" etc., passes to the grantee the right to the use of a reservoir situated a short distance above the mill property, to the extent reasonably necessary for the operation of the mill, where it appears at the time of the conveyance and for a long time prior thereto that the mills were dependent upon the use of the reservoir for power. See opinion for construction of particular provisions in such a deed. *Horne v. Hutchins*, 71 N. H. 117 (51 Atl. Rep. 645). For construction of particular contracts and conveyances concerning water rights, see *Carmichael v. Henry Wood's Sons Co.*, Mass. (67 N. E. Rep. 961); *Horne v. Hutchins*, 71 N. H. 128 (51 Atl. Rep. 651); *Fowler v. Kent*, 71 N. H. 388 (52 Atl. Rep. 554); *Rackliff v. Rackliff*, 96 Me. 261 (52 Atl. Rep. 839); *New River Mineral Co. v. Painter*, 100 Va. 507 (42 S. E. Rep. 300). For exhaustive note on "How far grant of mill includes water rights," see 58 L. R. A. 487-493.

WILLS.

EPITOME OF CASES.

Sec. 828. Revocation of wills. In Minnesota it is held that the statute conferring upon married women testamentary capacity operates to abrogate the common law rule that the will of a woman is revoked by her subsequent marriage. *Kelly v. Stevenson*, 85 Minn. 247 (88 N. W. Rep. 739; 56 L. R. A. 754; 89 Am. St. Rep. 545). See opinion for discussion of this subject. Construing and applying *Burns' Ind. Rev. Stat.*, §

2732, providing that "after the making of a will by an unmarried woman, if she shall marry, such will shall be deemed revoked by such marriage," it is held that a will made by a married woman who is subsequently divorced, is not revoked by her afterward remarrying. *Hobberd v. Trask*, 160 Ind. 498 (67 N. E. Rep. 179). Ga. Civ. Code, § 3347 construed and applied—revocation of will by subsequent birth of a child for whom no provision is made. *Sutton v. Hancock*, 115 Ga. 857 (42 S. E. Rep. 214). For a discussion of what written entries on the face of a will will operate as a revocation, see *Howard v. Hunter*, 115 Ga. 357 (41 S. E. Rep. 638; 90 Am. St. Rep. 121); *Oetjen v. Oetjen*, 115 Ga. 1004 (42 S. E. Rep. 387).

Sec. §29. Agreements to devise realty. A court of equity will specifically enforce an oral contract to make a will in a particular manner, where a valuable consideration has been received for the promise, and a fraud would be perpetrated upon the promisee or beneficiary unless the contract be performed. But the proof of such contract must be so cogent, clear, and forcible as to leave no reasonable doubt in the mind of the chancellor as to its terms and character; and, where the consideration consists of acts to be performed, there must be like proof that the acts performed refer to and result from that contract, and are such as would not have been done unless on account of that very agreement, and with a direct view to its performance. "There must be no equivocation or uncertainty in the case." *Kinney v. Murray*, 170 Mo. 674 (71 S. W. Rep. 197). See opinion for particular evidence held insufficient to establish such a contract. Where one during his lifetime placed a woman in possession of his real estate, in pursuance of a contract made with her to devise the land to her if she would take possession of and superintend it and administer to and care for him during his life, she may enforce performance of the agreement after his death through an action to quiet title, upon showing performance on her part. *Davies v. Cheadle*, 31 Wash. 168 (71 Pac. Rep. 728). A parol agreement made by one with his fourteen-year-old nephew and the boy's mother and guardian that if the boy would leave his home in a foreign country and accompany his uncle to America, live in his home and accept his care and instruction, he would treat him as a son and will him all his property, gives the boy an equitable right to his uncle's estate upon his death intestate, subject only to administration, where he has faithfully fulfilled

his part of the agreement for seventeen years. *McCabe v. Healy*, 138 Cal. 81 (70 Pac. Rep. 1008). See opinion for exhaustive collation of authorities. In Wisconsin it is held that an oral agreement to devise lands in consideration of services to be performed is not taken out of the statute of frauds by the mere performance of services, although they be of a personal nature. *Rodman v. Rodman*, 112 Wis. 378 (88 N. W. Rep. 218).

Sec. 830. Conditions in restraint of alienation or marriage. A condition in a will imposing a restraint upon alienation until the devisee arrives at a certain age, can not affect the rights of his creditors. *Smith v. Smith*, Ky. (73 S. W. Rep. 1028; 24 Ky. Law Rep. 2261). A condition in a devise of land to an infant that he shall not pledge, mortgage or sell the same until he is thirty-five years old, is valid. *Wallace v. Smith*, Ky. (68 S. W. Rep. 131; 24 Ky. Law Rep. 139). And so is a condition that the land devised shall not be sold or conveyed by the devisees until they have been in possession of it for twenty years. *Call v. Shewmaker*, (Ky.) 69 S. W. Rep. 749 (24 Ky. Law Rep. 1167). A stipulation in a devise of land by a testator to his children to be equally divided between them all "that none of the real estate so devised shall be sold until my youngest child shall be of lawful age," does not prohibit the sale of his undivided interest by any devisee at any time. *Roederer v. Hess*, 112 Ky. 807 (66 S. W. Rep. 1012; 23 Ky. Law Rep. 2165). A devise to the testator's mother "for her own use and benefit absolutely, provided that she does not marry again; but if she marries again," then to another, does not give her that unlimited power of disposition necessary to the creation of a fee, so as to render the limitation over void. *Overton v. Lea*, 108 Tenn. 505 (68 S. W. Rep. 250). A devise of real and personal property to a testator's wife "so long as she remains my widow; then two thirds of what is left to go to my heirs, to be equally divided," does not give her a fee, but only an estate subject to her subsequent marriage, and with limitation on her remarriage that she should then take one-third of the estate or homestead, as she might elect. *Shaw v. Shaw*, 115 Ia. 193 (88 N. W. Rep. 327).

Sec. 831. Right to maintain action to construe will. A complaint by one as executrix, and also as sole heir, alleging

that testator was the owner of certain real estate which descended to and vested in her in fee simple, except only as the title thereto is otherwise vested by the will, which is averred to have been duly exercised, probated and recorded, and that defendants assert that under the provisions of the will a duty and trust is imposed upon plaintiff, in her capacity as executrix, to sell a certain portion of the real estate, and keep all of the buildings insured and in good repair, states facts sufficient to entitle plaintiff to a construction of the will. *Hughes v. Hughes*, 30 Ind. App. 591 (66 N. E. Rep. 763). The court say: "The right to maintain an action for the construction of a will depends upon a well recognized branch of equity jurisprudence, stated as follows: 'The doctrine, which seems to be both in harmony with principle and sustained by the weight of authority, is that the special and equitable jurisdiction to construe wills is simply an incident of the general jurisdiction over trusts; that a court of equity will never entertain a suit brought solely for the purpose of interpreting the provisions of a will, without any further relief, and will never exercise a power to interpret a will which only deals with and disposes of purely legal estates or interests, and which makes no attempt to create any trust relations with respect to the property donated.' *Pomeroey Eq.* § 1156; *Minkler v. Simons*, 172 Ill. 325 (50 N. E. Rep. 176); *Edgar v. Edgar*, 26 Or. 65 (37 Pac. Rep. 73); *Dill v. Wisner*, 88 N. Y. 153, 160; *Torrey v. Torrey*, 55 N. J. Eq. 410 (36 Atl. Rep. 1084); *Hart v. Leonard*, 47 N. J. Eq. 419 (7 Atl. Rep. 865); *Bowers v. Smith*, 10 Paige, 193; *Fahy v. Fahy*, 58 N. J. Eq. 210 (42 Atl. Rep. 726); *Tyson v. Tyson*, 100 N. C. 360 (6 S. E. Rep. 707); *Bailey v. Briggs*, 56 N. Y. 413 * * * Wills are not construed to meet possible contingencies that may never arise. The time and attention of the court can not be engaged to solve speculative doubts. It is only when the executor is under a present necessity of acting, or when he has reason to believe that he will soon be called upon to proceed under a doubtful provision, that he is entitled to instructions. *Bullard v. Attorney Gen'l*, 153 Mass. 244 (26 N. E. Rep. 691); *Bonnell v. Bonnell*, 47 N. J. Eq. 540 (20 Atl. Rep. 895); *Balsey v. Balsey*, 116 N. C. 472 (21 S. E. Rep. 954); *Morse v. Lyman*, 64 Vt. 167 (24 Atl. Rep. 763); *Little v. Thorne*, 93 N. C. 69; *Minot v. Taylor*, 129 Mass. 160." Questions relative to the rights of persons named in a will in case certain things happen which have not happened will not be considered

in an action to construe a will. *Hall v. Cogswell*, 183 Mass. 521 (67 N. E. Rep. 644).

Sec. 832. Construction of wills—Rules for—General principles. The validity of a will is to be determined by the law in force at the time of the testator's death. In *re Kopmeir*, 113 Wis. 233 (89 N. W. Rep. 134). The illegality of an intervening trust created by the terms of a will does not affect the devise of the remainder which is unaccompanied by any trust whatever. *Ham v. Twombly*, 181 Mass. 170 (63 N. E. Rep. 336). A devise of mortgaged land passes the land to the devisee leaving the debt to be paid from the testator's personal assets, unless a contrary intention appears in the will. *Bulkeley v. Seymour*, 74 Conn. 459 (51 Atl. Rep. 125; 92 Am. St. Rep. 229). A devise made by a testator on account of a full and valuable consideration, such as the giving of notes by the devisee to another for whom the testator intended to provide, does not lapse and become void by reason of the devisee dying prior to the testator. *Ballard v. Camplin*, 161 Ind. 16 (67 N. E. Rep. 505). A word in a will which would render it absurd when applied to the real facts may be rejected, and the grammatical construction disregarded in order to give effect to the testator's manifest intention. *Scarlett v. Montell*, 95 Md. 148 (51 Atl. Rep. 1051). See *Twiss v. Simpson*, 183 Mass. 212 (66 N. E. Rep. 795). When necessary to effect the intention of the testator "or" may be construed as "and." *Moore's Adm'r v. Sleet*, Ky. (68 S. W. Rep. 642; 24 Ky. Law Rep. 426). Where a stipulation in a will gave one a life estate in property and "at his death the property to be sold for the benefit of his heirs," "his heirs" referred to was held to be the testator's heirs," *Abel v. Abel*, 201 Pa. St. 543 (51 Atl. Rep. 333). When used in connection with a devise of realty, the words "legal representatives" are to be construed as equivalent to the word "heirs." In *re Lesieur's Estate*, 205 Pa. St. 119 (54 Atl. Rep. 579). For cases discussing the use of the words "children," "issue" and "heirs," see *Plummer v. Shepperd*, 94 Md. 466 (51 Atl. Rep. 173); *Caulk's Lessee v. Caulk*, 3 Pen. (Del.) 528 (52 Atl. Rep. 340); *Watson v. Williamson*, 129 Ala. 362 (30 So. Rep. 281).

Where no provision or mention is made in the will itself of the disposition intended to be made of the portion of the devisees dying prior to the testator, and no intention can be gathered from the instrument itself what disposition the testator

desired to make of the lapsed devises, they pass as intestate property. *Magnuson v. Magnuson*, 197 Ill. 496 (64 N. E. Rep. 371). Where a statute requires all last wills and testaments to be in writing and properly witnessed, extrinsic evidence is never admissible to alter, detract from, or add to the terms of a will. If the words of the testator as to the donee and subject of the gift are unambiguous, those words can not be varied by evidence of extraneous facts; however clearly a different intention may appear. But when there is a latent ambiguity in the description of the object or subject of the gift, and such ambiguity can be removed by rejecting false words, leaving a complete, intelligible description, it is the duty of courts to do so, as, where there are two descriptions, one good and the other bad, the authorities are uniform to the effect that the latter may be rejected. *Vestel v. Garrett*, 197 Ill. 398 (64 N. E. Rep. 345). See opinion for application of these rules to particular facts. Wis. Rev. Stat., § 2082, 2084 construed and applied—devise of land to trustees to be sold. *McLenegan v. Yeiser*, 115 Wis. 304 (91 N. W. Rep. 682). For exhaustive collation of authorities on "Ademption of legacies," 95 Am. St. Rep. 342-370.

Sec. 833. Devise to heirs at law in equal shares—Per stirpes or per capita. Where a will, after providing for the distribution of two thirds of the testatrix's property to certain persons in life at the time of her decease, provides that "the other one-third be distributed in equal shares to my own heirs at law then in life," it is held that the distribution provided for among the heirs at law of the testatrix should be per stirpes and not per capita. *MacLean v. Williams*, 116 Ga. 257 (42 S. E. Rep. 485; 59 L. R. A. 125). The court say: "When the words 'heirs at law' are used in a will, unless there is something to indicate a contrary intention, it is to be presumed that the testator intended not only that the persons taking should be those who would take under the statute of distributions, but that the quantum of interest of each should be what each individual would take under the statute. Is the use of the expression 'equal shares' alone sufficient to overcome this presumption? The shares under the statute of distributions are equal. As was said in *Odam v. Caruthers*, 6 Ga. 42, persons standing in unequal degrees are allowed to take per stirpes 'to fulfill the equity of the statute, which contemplates an equal distribution.' If all the heirs at law stand in the same relation

to the decedent, they take equally per capita. If some stand in different degrees from others, they take per stirpes, but they take equally nevertheless. The estate in either event is divided into shares, and equal shares, although in the one case each share goes to an individual, and in the other case the equal shares go to a class of individuals. The statute of distributions sets forth the settled policy of the law as to where the estate of a decedent shall go. While the testator is allowed to ignore, either in part or altogether, the rules laid down in that statute, it will not be presumed that it was the intention of the testator to disregard the law as it is contained in the statute in any part, unless the terms of the will are such as to make this intention manifest. Mr. Page says: "A devise to 'children and heirs' of two persons named, to be divided among them 'equally,' was held to call for a distribution per stirpes, since the word 'heirs' so strongly implies representation that it overcomes the force of the word 'children' and 'equally,' both of which call for a distribution per capita." Page, Wills, § 556. In 15 Am. & Eng. Enc. Law, p. 322, we find the rule stated in these words: 'A devise to heirs, whether to one's own heirs or to the heirs of a third person, designates not only the persons who are to take, but the manner and proportion in which they are to take. Where there are no words to control the presumption, the law presumes the intention to be that they take as heirs would take by the rules of descent.' See, also, Schouler, Wills (3d Ed.) § 538 et seq.

While adjudicated cases construing other wills are generally not helpful in arriving at what is the proper construction to be placed upon a will under consideration in a given case, for the reason that no two wills are in exactly the same language, still rulings in other cases serve to show what are the general rules to be resorted to in arriving at the intention of the testator in a given case, and the trend of judicial thought in reference to the proper application of such rules to devises or bequests of a similar nature to the one under consideration. In the following cases, bequests or devises in language somewhat similar to the item of the will under consideration in the present case were held to require a distribution per stirpes; *West v. Rassman*, 135 Ind. 278 (34 N. E. Rep. 991); *Taylor v. Fauver*, (Va.) 28 S. E. Rep. 317; *Houhgton v. Kendall*, 7 Allen, 72; *Balcom v. Haynes*, 14 Allen, 204; *In re Swinburne*, 16 R. I. 208 (14 Atl. Rep. 850); *Baskin's Appeal*, 3 Pa. 304 (45 Am. Dec. 641); *Templeton v.*

Walker, 3 Rich. Eq. 543 (55 Am. Dec. 646); *Roome v. Counter*, 6 N. J. L. 111 (10 Am. Dec. 390); *Rivenett v. Bourquin*, 53 Mich. 10 (18 N. W. Rep. 537); *Ferrer v. Pyne*, 81 N. Y. 281; *Thomas v. Miller*, 161 Ill. 60 (43 N. E. Rep. 848); *Kelley v. Vigas*, 112 Ill. 242 (54 Am. Rep. 235); *Raymond v. Hillhouse*, 45 Conn. 467 (29 Am. Rep. 688); *Bassett v. Granger*, 100 Mass. 348; *Minter's Appeal*, 40 Pa. 111; *Dukes v. Faulk*, 37 S. C. 255 (16 S. E. Rep. 122; 34 Am. St. Rep. 745); *Hoch's Estate*, 154 Pa. 417 (26 Atl. Rep. 610). In the following cases somewhat similar language was held to require a distribution per capita: *Bisseon v. Railroad Co.*, 143 N. Y. 125 (38 N. E. Rep. 104); *Scott's Estate*, 163 Pa. 165 (29 Atl. Rep. 877); *Ramsey v. Stephenson*, 34 Or. 408 (56 Pac. Rep. 520; 57 Pac. Rep. 195); *McKelvey v. McKelvey*, 43 O. St. 213 (1 N. E. Rep. 594); *Record v. Fields*, 155 Mo. 314 (55 S. W. Rep. 1021); *Stevenson v. Lesley*, 70 N. Y. 512; *Nichols v. Denny*, 37 Miss. 59; *Farmer v. Kimball*, 46 N. H. 435 (88 Am. Dec. 219); *Brittain v. Carson*, 46 Md. 186; *Richards v. Miller*, 62 Ill. 417; *Best v. Farris*, 21 Ill. App. 49; *Hill v. Spruill*, 39 N. C. 244; *Harris v. Philpot*, 40 N. C. 324; *Lord v. Moore*, 20 Conn. 122; *Johnson v. Knight*, 117 N. C. 122 (23 S. E. Rep. 92)."

Sec. 834. Devise to a class—Death of some of class before testator. Construing and applying Ia. Code, § 3281, providing that "if a devisee die before a testator, his heirs shall inherit the property devised to him, unless from the terms of the will a contrary intent is manifest," it is held that the statute applies to a devise to a class as well as to individuals; and a devise to a class, one of the members of which is dead when the will is executed, can not operate for the benefit of his heirs. In *re Nicholson's Will*, 115 Ia. 493 (88 N. W. Rep. 1064; 91 Am. St. Rep. 175). The court say: "Since a will speaks from the day of the testator's death, the members of the class, where the devise is to a class, are prima facie to be determined upon the death of the testator. *Ruggles v. Randall*, 70 Conn. 44 (38 Atl. Rep. 885); *Richardson v. Willis*, 163 Mass. 130 (39 N. E. Rep. 1015); *Buzby v. Roberts*, 53 N. J. Eq. 566 (32 Atl. Rep. 9). But this is not an unyielding rule, even at common law. The will itself may indicate a contrary intent, and if that be so this intent will be adopted and enforced. In *re Swenson's Estate*, 55 Minn. 300 (56 N. W. Rep. 1115); *Bailey v. Brown*, 19 R. I. 669 (36 Atl. Rep. 581).

Under the common-law rule, the members of the class to whom testator left his residuary estate would be determined upon the day of his death; and, as applicant herein is neither a nephew nor a niece, he would be excluded. Applicant's counsel contend, however, that the statute which we have quoted modifies this rule to this extent; that, although the members of the class are to be determined as upon the day of the testator's death, yet, as the applicant is an heir of one of that class, who would have taken under the will, had his mother survived, he is entitled to her share, and that the decree of the trial court, so holding, is correct. Some of the cases hold that the general common-law rule with reference to gifts to a class is not affected by these statutes, for the reason that they are only intended to apply where something is given by will to one who dies before the testator, and have no application to gifts to a class, where the gift is, in legal effect, only to the members of that class in existence at a designated time. See *In re Harvey's Estate*, [1893] 1 Ch. 567; *Martin v. Trustees*, 98 Ga. 320 (25 S. E. Rep. 522). This is also the rule in England. *Olney v. Bates*, 3 Drew, 319; *Browne v. Hammond*, Johns. Eng. Ch. 210. But in other states these statutes are held applicable to gifts to a class as well as to individuals. *Howland v. Slade*, 155 Mass. 415 (29 N. E. Rep. 631); *Bray v. Pullen*, 84 Me. 185 (24 Atl. Rep. 811); *Strong v. Smith*, 84 Mich. 567 (48 N. W. Rep. 183); *Parker v. Leach*, 66 N. H. 416 (31 Atl. Rep. 19); *In re Bradley's Estate*, 166 Pa. 300 (31 Atl. Rep. 96); *Jones v. Hunt*, 96 Tenn. 369 (34 S. W. Rep. 693); *Wildberger v. Cheek's Ex'rs*, 94 Va. 517 (27 S. E. Rep. 441). The numerical weight of authority seems to favor this rule, although it will also yield to the intent of the testator as found in the context of the will, or as shown by competent and legitimate evidence. *White v. Institute*, 171 Mass. 84 (50 N. E. Rep. 512); *Bigelow v. Clap*, 166 Mass. 88 (43 N. E. Rep. 1037); *Almy v. Jones*, 17 R. I. 265 (21 Atl. Rep. 616; 12 L. R. A. 414). The reason for this general rule appears to be that, as the statute is remedial in character, it should receive a liberal construction, so as to advance the remedy and suppress the mischief; that wills are presumed to be drawn with reference to existing laws, and that in arriving at a testator's intent we must presume that he had knowledge of the law, and drafted his will accordingly; that in gifts of the class in question a testator is presumed to treat all members of the class as surviving, although some of them be dead, and that,

in the absence of other evidence, this presumption will be conclusive; and that there is no substantial difference between a gift to all of a class, and a gift to each member thereof, naming them. Where there is such conflict in authority, much may be said in support of either rule. Despite the temptation, we will not enter into a further discussion of the matter, but content ourselves with saying that we prefer the doctrine announced by the greater number of the cases as a rule of general application, but that, like all other rules on the subject, it must yield to the intent of the testator, when that can be ascertained; for that is the polar star of all inquiry in such cases. *Daboll v. Field*, 9 R. I. 266.

With these rules settled, we are now brought down to the pivotal point in the case, to wit, does the statute apply to a case where the devise is to a class, one of the members of which is dead at the time the will was executed, so that the heirs of the deceased member take by substitution or representation? Here, again, there is a decided and irreconcilable conflict in the cases. Holding to the affirmative of the proposition are *Bray v. Pullen*, 84 Me. 185 (24 Atl. Rep. 811); *Wildberger v. Cheek's Ex'rs*, 94 Va. 517 (27 S. E. Rep. 441); *Winter v. Winter*, 5 Hare, 306; *Moses v. Allen*, 81 Me. 268 (17 Atl. Rep. 66); *Jamison v. Hay*, 46 Mo. 546; *Chenault's Guardian v. Chenault's Estate*, (Ky.) 9 S. W. Rep. 775. On the other hand, statutes to prevent lapses are held not to apply where the supposed devisee is dead at the time the will is made. *White v. Institute*, 171 Mass. 84 (50 N. E. Rep. 512); *Billingsley v. Tongue*, 9 Md. 575; *Lindsay v. Pleasants*, 39 N. C. 320; *Almy v. Jones*, 17 R. I. 265 (21 Atl. Rep. 216; 12 L. R. A. 414); *Tolbert v. Burns*, 82 Ga. 213 (8 S. E. Rep. 79). We can not take the time or space necessary to review these authorities. Some of them were decided on facts indicating the testator's intent to be in accord with the statutory construction, and at least one on a statute which provided that the issue of the devisee who is dead at the time of the making of the will shall take the property given to him. We do not favor any arbitrary rule with reference to this matter, preferring to leave each case to be determined on its own peculiar facts. We may say, however, that at common law a legacy or devise to a person who was dead at the time of the making of the will was void, or, as some cases put it, lapsed. And it is only perforce of a somewhat strained construction of language that statutes similar to the one under construction are held to modify this rule. In

Kentucky there is an express statute which does so. See cases heretofore cited. And we understand Tennessee has a like statute. See *Dixon v. Cooper*, 88 Tenn. 177 (12 S. W. Rep. 445). This general rule also obtained even where the testator knew that the donee was dead. *Dildine v. Dildine*, 32 N. J. Eq. 78. If a deceased beneficiary is specifically named in the will, this, perhaps, is a sufficient indication that the testator intended his heirs to take, under the statute before quoted, as substitutional or representative devisees. But where the gift is to a class, of which there are many members, it is reasonable to suppose that the testator had in mind only those of that class who were living at the time he made his will."

For construction of a similar statute (Ky. Stat., §§ 2064, 4841), see *Ruff v. Baumbach*, Ky. (70 S. W. Rep. 828; 24 Ky. Law Rep. 1167).

Sec. 835. Devise over in case of death without issue.

A devise over by a testator, after a life estate to another, to his children, with a provision that if any should die without issue his share should be divided equally among the survivors, gives each child his interest subject to being defeated by his death without issue before the life tenant, and such interest becomes absolute by the death of the life tenant. *Lewis v. Shropshire*, (Ky.) 68 S. W. Rep. 426 (24 Ky. Law Rep. 331). After such an estate becomes absolute by the death of the life tenant it may be conveyed by the devisee and the title of his grantee is not affected by the subsequent death of the devisee without issue. *Baxter v. Isaacs*, (Ky.) 71 S. W. Rep. 907 (24 Ky. Law Rep. 1618).

Sec. 836. Devise over in case of death without issue—

Devise for life with power of disposal. Where lands are given to one for life, with remainder over, and power is also given the life tenant to sell or dispose of the land, the life tenant takes the power to sell the fee. *Englerth v. Keller*, 50 W. Va. 259 (40 S. E. Rep. 465). Citing, *Downie v. Downie*, 9 Biss. 353 (4 Fed. Rep. 55); *McGavock v. Pugsley*, 1 Tenn. Ch. 410; *Bishop v. Remple*, 11 O. St. 277; *Shaw v. Hussey*, 41 Me. 495; *Lillard v. Robinson*, 3 Litt. 415; *Benesch v. Clark*, 49 Md. 497; *Forsythe v. Forsythe*, 108 Pa. St. 129; *Crozier v. Hoyt*, 97 Ill. 23; *Markillie v. Ragland*, 77 Ill. 98; *Dodge v. Moore*, 100 Mass. 335. A deed purporting to convey the fee executed by a life tenant to whom power of sale is given need

not recite the power. *Thomas v. Wright*, (Ky.) 66 S. W. Rep. 993 (24 Ky. Law Rep. 2183); *Griffin v. Sanson*, 31 Tex. Civ App. 560 (72 S. W. Rep. 864). A general power to manage and sell given a life tenant does not authorize a testamentary disposition. *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144 (64 N. E. Rep. 267). A will devising a life estate and giving the life tenant power "to sell and convey any of the said property as she may think best," does not enlarge the estate to a fee simple where there is a devise over of "all the property remaining at her death." *Spaan v. Anderson*, 115 Ia. 121 (88 N. W. Rep. 200). The court say: "While, perhaps, this court has never expressly held that absolute power of disposal, without limitation as to the purpose to which the property may thus be appropriated, does not enlarge the express grant of a life estate so as to convert it into a fee simple, yet there are no cases inconsistent with this conclusion; and the authorities in other states seem to fully recognize the principle that to the devisee of a life estate this unlimited power of disposal may be added without affecting the nature of the estate devised. *Ernst v. Foster*, 58 Kan. 438 (49 Pac. Rep. 527); *Evans v. Folks*, 135 Mo. 379 (37 S. W. Rep. 126); *Collins v. Wickwire*, 162 Mass. 143 (38 N. E. Rep. 365); *Robeson v. Shotwell*, 55 N. J. Eq. 318 (36 Atl. Rep. 780)." To the same effect, see *Englerth v. Kellar*, 50 W. Va. 259 (40 S. E. Rep. 465); *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144 (64 N. E. Rep. 267). An express devise by a testator of all his property to his wife "for her natural life," is not enlarged into a fee simple estate by a subsequent independent clause in the will giving her power "to sell or convey the same to whomsoever she may see or think best to do during her lifetime." *Deemer & Bishop*, JJ., dissenting. *Podaril v. Clark*, 118 Ia. 264 (91 N. W. Rep. 1091). See conflicting opinions for discussion of this subject. In Tennessee, it is held that a life tenant to whom there is given an absolute disposition takes a fee, although there is a devise to others of the residue of the property not consumed by him. *Hair v. Caldwell*, 109 Tenn. 148 (70 S. W. Rep. 610). A will devising certain real estate to testator's wife, to have and hold "during her life, or while she may remain unmarried, to pay my debts, to support herself, and to maintain and educate minor children, and at her death or marriage the property to descend in equal proportions or shares to all my children," gives her a life estate only without any power of sale. *Winchester v. Hoover*, 42 Or. 310 (70 Pac. Rep. 1035).

Where a testator devises all of his property to his wife during her life with power to sell any of the property "for the benefit of the family," "in case of necessity," she is the sole judge of the existence of the necessity, and any disposition made by her in good faith is valid and vests title in the purchaser, although others might differ with her as to the necessity. *Matthews v. Capshaw*, 109 Tenn. 480 (72 S. W. Rep. 964). A power given to devisees of a life estate to sell and convey to the extent of one-third of the value of the property, "should circumstances or their necessity require," by a will explicitly reciting that the purpose of the testator was to keep his estate intact, does not authorize a life tenant to sell his interest in order to pay his debts voluntarily contracted by himself. *Mansfield v. Mansfield*, 203 Ill. 92 (67 N. E. Rep. 497). A devisee of land for life who is given the right "to use, sell and dispose of any or all of said estate for the use and support of herself," has the absolute right of disposal of the property in fee at any time she may conclude it is needed for her support and maintenance. *Henninger v. Henninger*, 202 Pa. St. 207 (51 Atl. Rep. 749). A will devising lands to the testator's wife for life with power to sell and convey as she may judge best, if necessary for the support of herself and son, does not authorize her to mortgage the land for less than its value even to secure advances for the purpose for which she might have sold the land. *O'Brien v. Flint*, 74 Conn. 502 (51 Atl. Rep. 547). A devise by a testator of all his property, subject to the payment of his debts, to his wife "to have and to hold, enjoy and use, during her natural life, with full power to sell and convey for the purpose of paying said debts, and for her own support, comfort, and maintenance," with remainder to others, gives her power only to convey for the payment of debts and for her support. *Baldwin v. Morford*, 117 Ia. 72 (90 N. W. Rep. 487).

Sec. 837. Bequest to an orphan asylum "in" a city. A bequest to take effect five years after the death of a testatrix to "an orphan asylum in the city of M., or, if no such orphan asylum be then in existence in said city" at such time, to a home for old ladies in such city; such asylum or home to be organized after the death of testatrix, if not in existence at that time, may be claimed by an orphan asylum outside the corporate limits of the city, but within one mile thereof, although there was a home for old ladies within the city. *Watson v.*

Dilts, 116 Ia. 249 (89 N. W. Rep. 1068; 93 Am. St. Rep. 239). The court say: "The appellant contends that the provision of the will which say 'or, if no such asylum be then in existence in said city,' the bequest 'is to go to a home for old ladies in said city,' should be construed to mean that the home or asylum must actually be within the corporate limits of the city, in order to take the bequest, and that, being so located, it is entitled thereto. It is true that the word 'in,' literally construed, often fixes the place with more definiteness and certainty than does the word 'at;' for, if we speak of being in a house or in a building, we are understood to mean that we are actually within its walls. But this is not always true when applied to geographical situation. It is a matter of common observation that the words 'in' and 'at' are used synonymously in speaking of cities and towns, or other geographical locations; for, if one were to say either that he was 'in' or 'at' Muscatine, the meaning would be the same, and he would not necessarily mean, or be understood as meaning, that his statement had reference to the geographical lines of the city. It may be conceded that a condition precedent to the taking of a bequest must be literally performed, but the trouble in this case does not arise over the application of this rule. The difficulty here is to determine what the condition is; for, if the intent of the testator was to require her beneficiary to be located within the corporate limits of Muscatine, the defendants have no case. But was that her intention? Her primary purpose was to endow an orphans' asylum which should be connected with her home city. If none should be in existence at the end of five years from her death, her bequest was then to go to an old ladies' home located there. Her thoughts were first of all for the fatherless and motherless waifs of the community, and they were the primary objects of her bounty. Can it be said that she intended to deprive them of the great benefits to be derived therefrom simply because the home which should be provided for them should be located just across a geographical line, though in fact recognized as one of the charitable institutions of the city she named? We think not. To us it is quite clear that she did not have in mind strict geographical lines, and that her sole purpose, as to locality, was to endow an institution which should be so clearly connected with her home city as to be recognized as a part thereof, and this is clearly the situation the defendant occupies. It was incorporated in Musca-

tine, and its officers are actual residents thereof, as we understand the record."

Sec. 838. Construction of wills—Estate devised. A devise by a testator "I leave to my dear wife and our sweet little children all that I possess," does not give the wife a fee simple, but creates a joint estate. *Fitzpatrick v. Fitzpatrick*, 100 Va. 552 (42 S. E. Rep. 306; 93 Am. St. Rep. 976). A devise of a tract of land known as "C Place" by a testator owning one-half thereof at the time of the execution of the will passes the whole thereof where he acquired the other half before his death, under Miss. Code 1871, § 2388, authorizing the devise of after-acquired lands. *McRae v. Lowery*, 80 Miss. 47 (31 So. Rep. 538). As to devising after-acquired property, see *Dearing v. Selvey*, 50 W. Va. 4 (40 S. E. Rep. 478). A will devising "to my son J. F., the farm on which I now live after the death of my wife, S. F., the title of said farm to be and remain in the hands of my executors who are to take charge of said farm at any time when the said J. F. lets the farm, or income thereof is wasted, and the executors to take charge of the farm and pay the said J. F. the income or profits therefrom," does not give the son a fee simple estate. *Frantz v. Race*, 205 Pa. St. 150 (54 Atl. Rep. 714). A testatrix's will, directing her trustees to hold a house and its furniture "as a residence and home" for her grand nephew who at his majority was to have the right to elect if he wishes said house as his parmanent home," gives him a fee upon his making an election so to take the house though he subsequently abandoned it as a home. *In re King's Estate*, 205 Pa. St. 416 (54 Atl. Rep. 1094). A devise by a testator owning only a small farm on which he resided, providing that his wife should occupy his "home and residence" during her life, "and also my daughter, as long as she remains single," gives the daughter the right to the possession of the farm after the death of the wife, as long as she remains single. *Graham v. Heidrich*, 204 Pa. St. 238 (53 Atl. Rep. 1002). A provision in a devise to a testator's daughter that in case of her death before his grand children, or either of them, the property should go to the surviving grand children, gives the daughter a determinable fee subject to being divested by her death before that of all the testator's grand children. *Pulse v. Osborn*, 30 Ind. App. 631 (64 N. E. Rep. 59). For particular devises held to create a defeasible fee, see *Bradsby v. Wallace*, 202 Ill. 239 (66 N. E. Rep. 1088); *Whitfield v. Garriss*, 131

N. C. 148 (42 S. E. Rep. 568); *Chenault v. Scott*, (Ky.) 66 S. W. Rep. 759 (23 Ky. Law Rep. 1974); *Aultman & Co. v. Gibson's Guardian*, (Ky.) 67 S. W. Rep. 57 (23 Ky. Law Rep. 2296). As a general rule a devise of the rents and profits of land passes title to the land itself; but where a testator who dies leaving a wife and one child surviving him devises the whole of the proceeds or income for their support and the education of the child and directed the investment of money in real estate for their benefit, but added a stipulation "that my wife shall not have the power of disposing of any portion of my estate," it is held that she took a life estate in one-half of the property, with remainder to testator's daughter in fee, and the daughter took an estate in fee to the other half. *Mayes v. Karn*, Ky. (72 S. W. Rep. 1111; 24 Ky. Law Rep. 2110). *Burns' Ind. Rev. Stat.*, § 3341 construed and applied—devise to two or more—estate in common. *Pulse v. Osborn*, 30 Ind. 631 (64 N. E. Rep. 59). For cases which depend upon particular facts and construe particular wills, as to estate devised, see *Whitby v. Jump*, 94 Md. 185 (50 Atl. Rep. 701); *Hersey v. Purington*, 96 Me. 166 (51 Atl. Rep. 865); *Clough v. Clough*, 71 N. H. 412 (52 Atl. Rep. 449); *Plaenker v. Smith*, 95 Md. 389 (52 Atl. Rep. 606); *Zimmerman v. Mechanics' Sav. Bank*, 75 Conn. 645 (54 Atl. Rep. 1120); *Chauncey v. Salisbury*, 181 Mass. 516 (63 N. E. Rep. 914); *Morrison v. Schorr*, 197 Ill. 554 (64 N. E. Rep. 545); *Halstead v. Coen*, 31 Ind. App. 302 (67 N. E. Rep. 957).

Sec. 839. Construction of wills—Particular wills. A devise of property by a married woman to her four children, to be held in common until 21 years after her death and that of her husband, and them to vest in severalty in fee simple, is valid, and will be given effect by the courts. *Ex parte Watts*, 130 N. C. 237 (41 S. E. Rep. 289). For cases which depend upon particular facts and construe particular wills, see: as to when there is a conversion, *Yerkes v. Yerkes*, 200 Ill. 419 (50 Atl. Rep. 186); as to when legacies are payable, *Parker v. Cobb*, 131 N. C. 25 (42 S. E. Rep. 531); as to vesting of estates, *Howell v. Gifford*, 64 N. J. Eq. 180 (53 Atl. Rep. 1074); *McLaughlin v. Penney*, 65 Kan. 523 (70 Pac. Rep. 341); taking per stirpes or per capita, *Levering v. Orrick*, Md. (54 Atl. Rep. 620); charge of support on lands, *Isner v. Kelley*, 51 W. Va. 82 (41 S. E. Rep. 158); devise to one on condition that she "reside" with testator's wife during

her life and treat her kindly, *Shuman v. Heldman*, 63 S. C. 474 (41 S. E. Rep. 510); as to the creation and administration of trusts, *Baldwin v. Trowbridge*, 62 N. J. Eq. 468 (50 Atl. Rep. 494); *Lee v. O'Donnell*, 95 Md. 538 (52 Atl. Rep. 979); *Lewis v. Harrower*, 197 Ill. 315 (64 N. E. Rep. 374); *French v. Northern Trust Co.*, 197 Ill. 30 (64 N. E. Rep. 105); *In re Kopmeier*, 113 Wis. 233 (89 N. W. Rep. 134); *Lester v. Stephens*, 113 Ga. 495 (39 S. E. Rep. 109); *Dulin v. Moore*, 96 Tex. 135 (70 S. W. Rep. 742); *Overton v. Nashville Trust Co.*, 110 Tenn. 50 (72 S. W. Rep. 108); *Marx v. Clisby*, 130 Ala. 502 (30 So. Rep. 517).

Sec. 840. Devise in lieu of marital rights—Election—Statutes construed. A widow's election to take under her husband's will which devises to her a life estate in her own land with remainder to others, does not operate to reduce her interest in such land to a life estate so as to give the remaindermen any interest therein, where it does not appear from the will without the aid of parol evidence that it devised her land. *Gray v. Williams*, 130 N. C. 53 (40 S. E. Rep. 843). Where a testator devising all his property in trust until his youngest child becomes of age provides for the payment of one-third of the income thereof to his wife and for the conveyance to her of one-third of the property upon the expiration of the trust, she can not claim both dower and the benefit of these provisions. *In re Gorden*, 172 N. Y. 25 (64 N. E. Rep. 753; 92 Am. St. Rep. 689, see pp. 695-705 for exhaustive note on "When a widow is by a will required to elect between its benefits and her right to dower or in the community property"). But it is held that where a testator devised his realty to his children, charging each portion, with one exception, with an annuity, to be paid to the widow annually during her life, she is not put to an election between the annuity and her dower, but may claim both, the will not expressly stating that the annuities were in lieu of dower. *Horstman v. Flege*, 172 N. Y. 381 (65 N. E. Rep. 202).

The contest by a husband of the validity of his wife's will is not a renunciation of a devise to him therein, within the meaning of Ill. Rev. Stat., ch. 41, § 11, so as to give him a right to dower, nor does such a contest extend the time given by the statute for the filing of a renunciation. The dower right conferred on a husband by § 12 of the statute has no application to one who does not renounce within one year after pro-

bate of his wife's will, a provision made therein for him. *Scheible v. Rinck*, 195 Ill. 636 (63 N. E. Rep. 497). *Burns'* Ind. Rev. Stat., §§ 2648, 2666 construed and applied—election by widow between will and statute of descent. *Miller v. Stephens*, 158 Ind. 438 (63 N. E. Rep. 847). Ia. Code, § 3376 construed and applied—serving copy of will on surviving husband or wife—election. *Bailey v. Hughes*, 115 Ia. 304 (88 N. W. Rep. 804). Ia. Code 1873, § 2452 construed and applied—effect of devise to wife of life estate in all of testator's property. *Percifield v. Aumick*, 116 Ia. 383 (98 N. W. Rep. 1101). Under Ky. Stat., § 1404, a testator's widow is not entitled to her dower and distributable share of her husband's estate where she has failed to renounce the provisions of his will, though the amount given her by the will does not equal the value of her dower and distributable share. *Bayes v. Howes*, Ky. (68 S. W. Rep. 449; 24 Ky. Law Rep. 281). A widow's election to take a bequest of a legacy made to her by her husband in lieu of dower by failing to dissent from the will within one year, as required by Shannon's Tenn. Code, § 4146, constitutes her a purchaser for value of such legacy, and, where part of it is taken for the payment of debts, she is entitled to be reimbursed from the balance of the estate, and may claim subrogation to the rights of testator's creditors against his real estate to that extent. *Overton v. Lea*, 108 Tenn. 505 (68 S. W. Rep. 250). Wis. Rev. Stat., §§ 2172, 2173 construed and applied—"provision" for widow in her husband's will—what is sufficient to put her to an election. *Willey v. Lewis*, 113 Wis. 618 (88 N. W. Rep. 1021).

Sec. 841. Powers contained in wills. A mere naked power given an executor by a will to sell real estate devised to others does not authorize him to mortgage it. *Parkhurst v. Trumbull*, 130 Mich. 408 (90 N. W. Rep. 25). A provision in a will, "I desire the remainder of my estate to be disposed of in accordance with the judgment and advice of my executor," gives the executor a valid unlimited power of disposal. In *re Watt's Estate*, 202 Pa. St. 85 (51 Atl. Rep. 588). The decision of one to whom land is devised with power to sell and re-invest "if a sale is advantageous," that a sale is advantageous or advisable is final and conclusive. *Johnson v. Dumeyer*, (Ky.) 66 S. W. Rep. 1025; 23 S. W. Rep. 2243). In *Mis-* Missouri it is held that a power given an executor to sell land, with the advice and consent of the testator's daughter and son, may

be exercised after the death of the son, with the consent of the daughter without an order of the probate court. *Wisker v. Rische*, 167 Mo. 522 (67 S. W. Rep. 218). The fact that a sale of property under a power can only be made on the request of one having a life estate therein, does not disqualify the holder of such estate from purchasing at such sale. *McLenegan v. Yeiser*, 115 Wis. 304 (91 N. W. Rep. 682). Where land is directed to be sold, the parties beneficially interested may, if competent and of full age, and the gift is not in trust, elect, before the conversion has actually taken place, to take the land, and where they have so elected, and the election has been made known, the power of sale in the executor's becomes extinguished, and they can not thereafter lawfully proceed to execute it. *Trask v. Sturges*, 170 N. Y. 482 (63 N. E. Rep. 534). The discharge of an executor directed by his testator's will to sell land, invest the proceeds and divide the accumulated amount, before the exercise of such power, upon his request, and acquiesced in by the beneficiaries, constitutes an election by them to take the land and operates as a reconversion. *Boland v. Tiernay*, 118 Ia. 59 (91 N. W. Rep. 836). Particular will held not to confer power of sale by implication. *Boymand v. Townley*, 62 N. J. Eq. 591 (51 Atl. Rep. 116). For construction and discussion of particular power of a devisee to dispose of real estate by will, see *Herrick v. Fowler*, 108 Tenn. 401 (67 S. W. Rep. 861).

Sec. 842. Miscellaneous notes. A testator with three children who devises one-half of his property to one of them, without making any mention of the others or disposition of the other half, dies intestate as to such half, and it descends to the three children in equal shares. *O'Hearn v. O'Hearn*, 114 Wis. 428 (90 N. W. Rep. 450; 58 L. R. A. 105). Where a testator, who conveys to his daughter and places her in possession of land already devised to her by the terms of a will previously executed, and by the terms of which she is required to pay one-third of a certain debt owing by him, she takes under the deed, and does not, by the acceptance of a bequest of personalty under the will, become liable for such debt except to the extent of the value of such personal estate. *Schaeffer v. Voght's Trustee*, Ky. (67 S. W. Rep. 54; 23 Ky. Law Rep. 2291). In construing Ohio Rev. Stat., § 5961, providing that a child born to a testator after the execution of his will, for whom no provision is made therein, "shall

take the same share of the estate, both real and personal, that he would have been entitled to if the testator had died intestate," it is held that a testatrix who makes no provision in her will for an after-born child can not deprive it of the right given by this statute even by an express declaration to that effect in the will. *German Mut. Ins. Co., v. Lushey*, 66 O. St. 233 (64 N. E. Rep. 120).

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